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NOTES.

From the *Times*, Dec. 2, 1896:—

REGISTRATION OF TITLE TO LAND.

SIR.—No one, and certainly no lawyer, has or can have any objection to the establishment of a system of registration of title to land, provided it be convenient, safe, and not unnecessarily costly.

The objection to the existing system is that it does not fulfil these conditions and requires radical revision. With such revision compulsion would be unnecessary, and a landowner would (as in Australia in the case of land granted before the establishment of registration in the colony) have the option of selecting whichever of the two systems of conveyancing—that now in general use, or registration of title—were the better suited to the circumstances of his property.

I venture to think that the evidence given before the Parliamentary Committee of 1895 established these propositions.

Lest it be said that the evidence was critical, not constructive, I will with diffidence submit what are, in my views, the essential conditions of a satisfactory system of registration of title. It

(a) Should be voluntary, in order, by competition, to give the officials every inducement to make it convenient and attractive.

(b) Should confer a guaranteed, not an absolute title, so that no true owner should lose his land except by his own act.

(c) Should allow of a detailed description of the land, so as to preserve evidence of boundaries, tenancies, &c.

(d) Should permit of the removal of land from the register, so as to make it easier for solicitors to advise clients to make trial of the system. This would only apply to land outside the area (if any) in which registration of title had been made compulsory.

(e) Should involve the production of the land certificate on all dealings with registered land, and should only permit the issue of a duplicate land certificate after full inquiry and advertisement. This would not only be a great protection against forgery

or personation, but would meet the bankers' requirements as to loans on equitable deposit.

(f) Should require the intervention of a solicitor as a responsible officer of the Court, in the same way as such intervention is required in the case of dealings with cash under the control of the Court and as authentication by a broker is required in the case of Government funds. This would prevent personation and be a great safeguard against any irregularity.

(g) Should be under the control of a board on which the Bar and solicitors should be represented, and on whose advice rules should be made. I should, personally, advocate the addition of two members of Parliament interested in land, but not lawyers.

If the measure is to be compulsory, one great incitement to development and consequent success will be taken away—namely, competition; while, as in order to deal with the mass of business which compulsion will force in, there must be a considerable staff, vested interests will be created with which, should the system not fulfil the expectations of its supporters, it will be difficult to deal.

In order to some extent to meet this, the area of compulsion (if still deemed necessary) should be fixed by the Bill, so that the sanction of Parliament would be required for its extension. This would be following the precedents of the Acts establishing registration of deeds in Middlesex and Yorkshire.

Moreover, if the system be made compulsory, the fees should, as in Australia, be nominal, or nearly so.

If a Bill were introduced to repeal the Act of 1875, and to establish a revised and improved system without the introduction of any compulsory clause, there would be no opposition to its passing and no difficulty in bringing the system into operation. If its working proved satisfactory, but was found to be improperly obstructed, a short Bill, making the system compulsory in a specified area, could be readily passed.

I am, Sir, your obedient servant,

BENJ. G. LAKE.

10, New Square, Lincoln's Inn, Dec. 1.

The only comment we have to make on Mr. Lake's excellent letter is that we agree with every word of it.

THE NATIONALITY OF CHILDREN OF NATURALIZED ALIENS.

In my article on the nationality of the children of naturalized aliens (see July number of this REVIEW, p. 280) I stated that nothing in the Naturalization Act, 1870, qualified an alien to whom a certificate of naturalization had been granted to be the owner of a British ship. Mr. Thomas Green in the October number (p. 301)

takes exception to this statement. The qualification in question according to him applies only to unnaturalized aliens, and is 'intended to withdraw British ships from the operation of section 2 conferring a general right of holding real and personal property on unnaturalized aliens.'

Neither the wording of the Act of 1870 nor his own reference to the Merchant Shipping Act, 1894, bears out this contention.

First as regards the Act of 1870, it enumerates under the heading 'Status of aliens in the United Kingdom' the exceptions to their capacity in regard to property. The essential part of the section is as follows:—

'Capacity of an alien as to property.'—Real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to an alien, in the same manner in all respects as through, from, or in succession to a natural-born British subject: Provided—

- (1) That this section shall not confer any right on an alien to hold real property situate out of the United Kingdom, and shall not qualify an alien for any office, or for any municipal, parliamentary, or other franchise:
- (2) That this section shall not entitle an alien to any right or privilege as a British subject, except such rights and privileges in respect of property as are hereby expressly given to him,' &c.

Under the same heading it deals with the 'Power of naturalized aliens to divest themselves of their status in certain cases.'

Sect. 4 is headed: 'How British-born subjects may cease to be such;' and sect. 5: 'Alien not entitled to jury *de medietate linguae*.'

These are the sections of the Act of 1870 relating to the 'status of aliens.'

Then follow the provisions of the Act as to how an alien may become naturalized, and determining the rights and privileges granted him as such, &c. At length in sect. 14, under the title of 'Miscellaneous,' comes the '*Saving as to British ships*,' which says: '*Nothing in this Act contained shall qualify an alien to be the owner of a British ship.*'

If Mr. Green's reading is correct, an alien by naturalization can become qualified to be the owner of a British ship. But sect. 14 says the contrary! If sect. 14 applies to unnaturalized aliens only, why is it inserted as a general provision applying to the whole Act, and not among the qualifications to the rights granted to aliens specially enumerated in sect. 2?

The wording of sect. 1 of the Merchant Shipping Act, 1894, referred to by Mr. Green is as follows:—

'A ship shall not be deemed to be a British ship unless owned wholly by persons of the following description (in this Act referred to as persons qualified to be owners of British ships); namely—... (b) Persons naturalized by or in pursuance of an Act of Parliament of the United Kingdom, or by or in pursuance of an Act or ordinance of the proper legislative authority in a British possession....

'Provided that any person who . . . has been naturalized . . . as aforesaid shall not be qualified to be owner of a British ship unless, after taking the said oath, or becoming a citizen or subject of a foreign state, or on or after being naturalized . . . as aforesaid, he has taken the oath of allegiance to Her Majesty the Queen, and is during the time he is owner of the ship either resident in Her Majesty's dominions, or partner in a firm actually carrying on business in Her Majesty's dominions.'

This provision tallies perfectly with the view that sect. 14 of the Act of 1870 applies to naturalized as well as unnaturalized aliens. In fact the object of sect. 14 of the Act of 1870 was apparently to leave the ownership of ships under the operation of sect. 18 of the Merchant Shipping Act, 1854, of which sect. 1 of the 1894 Act is merely a readjusted reproduction.

THOMAS BARCLAY.

THE LIMITATIONS IN CHUDLEIGH'S CASE.

One Richard Chudleigh, Knight, on the 26th of April, in the 3rd & 4th years of the reign of Philip and Mary, enfeoffed John Scutleger, Knt., Giles Strangeways, Knt., John Wadham, Esq., John Gilbert, Esq., Thomas Carew, Esq., Richard Bampfield, Esq., John Ridgeway, Esq., Robert Fulford, Esq., Thomas Williams, John Eveleigh, Gent., and William Hole, Gent. of the Manor of Hescot in Devon, to have and to hold the same to the said feoffees, their heirs and assigns for ever, to the use of the said Richard Chudleigh and his heirs of the body of Mary, then the wife of the aforesaid Thomas Carew, lawfully to be begotten; and for default of such issue, to the use of the aforesaid Richard Chudleigh and his heirs of the body of Elizabeth, then the wife of the said Richard Bampfield, lawfully to be begotten; and for default of such issue, to the use of the aforesaid Richard Chudleigh and his heirs on the body of Lawrentia, then the wife of the aforesaid Robert Fulford, lawfully to be begotten; and for default of such issue, to the use of the heirs of the said Richard Chudleigh¹ on the body of Emlen, then the wife of the said Thomas Williams, lawfully to be begotten; and for default of such issue, to the use of the aforesaid Richard Chudleigh and his heirs on the body of Johan, then the wife of the said John Eveleigh, lawfully to be begotten; and for default of

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such issue, to the use of the aforesaid Richard Chudleigh and his heirs on the body of Johan, then the wife of the aforesaid Giles Strangeways, lawfully to be begotten; and if it should happen that the said Richard Chudleigh should die without issue on the bodies of the said Mary, Elizabeth, Lawrentia, Emlen, Johan, and Joan, lawfully begotten, then the feoffees and their heirs should be seised of the manor aforesaid for the term of ten years after the death of the said Richard Chudleigh to the use and performance of his last will; and after the aforesaid term of ten years to the use of the feoffees and their heirs during the life of Christopher Chudleigh, Richard's eldest son; and after Christopher's death to the use of Christopher's first and other sons successively in tail¹. As the learned reader knows, Sir Richard Chudleigh died without any issue of the body of any of his feoffees' wives; after which the feoffees enfeoffed Christopher Chudleigh in fee; whereby, as was resolved in the celebrated case which still keeps alive the family name, the contingent uses limited in remainder to his first and other sons were destroyed².

The settlement in *Chudleigh's* case was mentioned by the late Mr. Joshua Williams, in his paper On the History of Settlements of Real Estate, read before the Juridical Society³, as an early instance of the modern method of settling lands on unborn sons successively in tail; and he noticed the curious form of the limitations to Sir Richard Chudleigh and his heirs of the bodies of his feoffees' wives, and observed that it was hard to say with what object they were inserted. Others may also have been puzzled by these apparently fantastic uses. So it may be of interest to note that they are thus explained in Popham's report of *Chudleigh's* case⁴. I quote verbatim:—

' Popham said, That in as much as the manner of assurance made by Sir Richard Chudleigh may seem strange, and in some manner to touch the reputation of the said Sir Richard (who was a grave and honest gentleman) to those that hear it, and do not know the reason why he did it, which I remember to be this as I have heard, to wit, That the said Christopher had killed one Buller, a gentleman of good reputation, whereupon he fled into France, and the said Sir Richard doubting what would become of his estate, if he should die before he had settled his land, and yet having a desire to have power to undo the assurance which he purposed to make, if he pleased, his counsel then thought the best way to make and devise the assurance so that such an estate of inheritance might thereby be in him which could not descend to the said Christopher, and yet such that he might thereby undo the assurance made by

¹ 1 Rep. 114, 115.

² *Chudleigh's* case, 1 Rep. 120.

³ Papers read before the Juridical Society, i. 45, 48, 49.

⁴ Sub. nom. *Dillons v. Freine*, Poph. 70, 76.

the recovery when he pleased, and yet such also as should never take effect in any of the issues of his other wives, to the prejudice of his right wives [*qu.* heirs], because he never had a purpose to marry with any of these wives.'

In other words, Sir Richard wished to have the power of defeating his settlement by suffering a common recovery, and yet to have an estate which should not descend to his issue. And it was to effect this object that the ingenious conveyancer limited the land to the use of him and his heirs to be lawfully begotten of the bodies of other men's wives.

The reason why he took so many as six would appear to be to guard against the contingency of Sir Richard being left tenant in tail after possibility of issue extinct; which would have hindered him in suffering a recovery¹.

T. CYPRIAN WILLIAMS.

Our Legislature has delivered itself on the Companies Acts in its usual oracular style, leaving to the Courts the interpretation of its mystic utterances. 'Any seven or more persons,' it says, 'associated for any lawful purpose may, by subscribing a memorandum of association and otherwise complying with the requisitions of this Act, form an incorporated company with or without limited liability.' Does 'associated' here mean that the whole seven must be bona fide intending traders in partnership, or will one trader and six dummies do? The House of Lords has said in *Salomon v. Salomon* (W. N. 1896, p. 160) that the one trader and the six dummies will do, treating the statutory conditions as mere machinery. You touch the requisite button and the company starts into existence, a legal entity, an independent *persona*. But it would be 'sticking in the bark' to treat the decision in *Salomon v. Salomon* as a dry point of construction. Its real significance is that it interprets the policy of the Companies Act to sanction an individual trading with limited liability. Is there anything really startling in this? Sir George Jessel saw no objection to it, indeed much advantage; and there is no hardship to creditors. When once the Legislature sanctioned limited liability, it followed that the creditors must look to the capital—the limited fund—and that only. Whether there is one person behind the company or seven or 70,000 makes no difference whatever to the creditors. It is not the constituency of the company, but its capital which concerns them.

On the point of literal construction, opinions may differ. But no one who knows anything of the earlier history of the Companies Acts can doubt, as a matter of fact, that such a decision as has now

¹ See Litt. ss. 32-34; Co. Litt. 362 a; *Cruise on Recoveries*, ii. 187. Of course the settlement in *Chudleigh's case* was made before Stat. 14 Eliz. c. 8.

been given would have been impossible thirty or even twenty years ago. When the founders of company legislation spoke of seven or more persons being 'associated,' they meant such an association as, without the help of the statute, would have made those persons members of an ordinary partnership. And where the materials for a real partnership do not exist, there it would not have occurred to any equity lawyer to see the materials for a company. What is more, it is far from clear that there is not still room in a similar case for the argument that there is no real association and nothing capable of registration. Lord Davey said in the course of his judgment:—'It was not argued in this case that there was no association of seven persons to be registered, and the registration therefore operated nothing, or that the so-called company was a sham and might be disregarded.' (As the suit was constituted, the company could not be heard to deny its own existence.) 'I do not say that such an argument ought to or would prevail; I only observe that, having regard to the decisions, it is not certain that s. 18, making the certificate of the registrar conclusive evidence that all the requisitions of the Act in respect of registration had been complied with, would be an answer to it.' So perhaps the One-Man Company is not quite safe after all.

An Ibsenite correspondent favours us with the following communication:—

It is proposed in the course of the ensuing sittings, if the use of one of the halls of the Inns of Court can be obtained, to produce a moral and symbolic play entitled 'Little I'm-off.' An outline of the action is subjoined, but for convenience some of the explanations which in the text are reserved for the second act are here given with the *dramatis personae*. The persons are:—

Mr. and Mrs. Allshares. (She is an advertising broker's daughter with a settlement of deferred debentures. He sits for a trading constituency, and is writing an Encyclopaedia of Commercial Morality.)

Little I'm-off (*sc.* the list of contributors). Their hopeful son. He has learnt everything but common arithmetic. He was once left alone with Buckley on the Companies Acts while Mrs. Allshares made Mr. Allshares explain to her the rule in *Ex parte Waring*, which, however, she did not understand. Since that date Little I'm-off, who was intended for the Church, has collected prospectuses and refused to work for his certificate examination).

Miss As 'twere (*sc.* I cannot tell how: she symbolizes the sound but bewildered professional conscience of the ordinary lawyer).

Liquidator Boardham (explains himself).

The L—d Ch—r disguised as the Guinea-pig-wife. (It may be necessary to inform posterity that he is not his predecessor Lord Campbell, and Lord Campbell's Christian name was not Patrick. Nevertheless a two-deep inner meaning, or symbolism of the second *Potenz*, may be deduced from the reflection that Lord Campbell invented the judicial infallibility of the House of Lords.)

Act I. Return of Mr. Allshares. Questionings. 'Have you found the gold in the green forests?' 'No, I was thinking of paper. I have been among the high-soaring memoranda and the great waste-paper baskets full of allotments.' He announces his resolve to start Little I'm-off in a safe business as a wig-maker. Liquidator Boardham: 'That's right. Sound line, wigs. They can't keep much hair on if we play up to this form, you know. Such a jolly world for me, too! I've nobody left that I can examine. Going north for a boom in motor-cars. Won't you come, Miss As 'twere?' Enter the Guinea-pig-wife, dressed in tattered scrip, with a Noble Director in a bag: when his head protrudes he is seen to be wall-eyed and to have a very blunt nose. 'Yes, my Lords, it was hard work when we had to start with seven live ones, that was. Now you can do the trick with one live and six stuffed . . . three-farthing shares, halfpenny stamp on application and balance on allotment . . . and they all come after me, bless 'em, and I take 'em down into liquidation . . . into restful depths far below where there are any assets.' Little I'm-off (staring at the Noble Director): 'Never saw such an impecunious countenance. But it's oofish—nice and oofish all the same.' The Guinea-pig-wife: 'Isn't he? Yes. That's so. One live *infant*. See?' . . . Little I'm-off slips out after the Guinea-pig-wife while the others are discussing the shock to their commercial morality. Shouts without. What? no! yes! can't mean it! yes! it is—*The Company is floating!*

Act II. The survivors reprimand for about nineteen weeks, and ultimately agree that they are all jointly and severally liable for the bad drafting of the Acts. Here come in shocking revelations from the old blotting-books of the L—d Ch—r's S—y and the P—y C—l's office.

Act III. Miss As 'twere nearly despairs of the law and thinks of migrating to the Parliamentary Bar, but concludes that motors will bring business and goes off with the Liquidator. Mr. and Mrs. Allshares regret too late that there are not enough characters left on the stage to form another company, but console themselves by deciding to found a Home for Decayed Promoters (limited and reduced).

Is the acceptor of a bill of exchange, intending that it shall be put into circulation, under a duty to every person who may become the holder thereof 'not to be negligent with regard to the form of the instrument'? or, in other words, is the acceptor bound to see that the bill which he signs is a bill which cannot be altered by a forger so as to appear of more value than its true worth?

That the question should even be raised would appear to most persons curious; that it should have been answered by a very competent judge in the affirmative must appear astounding. All commercial men will, we take it, be relieved by finding that the Court of Appeal and the House of Lords have in *Scholfield v. Earl of Londesborough*, '96, A. C. 514, 65 L. J. Ch. 593, replied to the inquiry raised with a decided negative. Lawyers will also feel it an advantage that in the same case great doubts have been thrown upon the authority of *Young v. Grote*, 4 Bing. 253. It is perhaps to be regretted that the House of Lords should not have gone a little further, and have entirely overruled a case which henceforward at any rate will rather cause perplexity than afford guidance to any one called upon to consider the liability of a drawer of a bill for subsequent and fraudulent alterations.

What is the situation of a debt? This is a problem which has perplexed our Courts under the Probate Duty Acts, and will still occasionally perplex them under the Finance Act. *Henly v. The Queen*, '96, A. C. 567, 65 L. J. P. C. 94, though it arises under a colonial Act, will supply some guidance to English judges. It decides that, in the opinion at any rate of the Privy Council, the debts of a testator domiciled in Victoria, which are charged by way of mortgage on land in New South Wales, are, in so far at any rate as they do not exceed the value of the security, to be regarded as situate in New South Wales. This is of some importance, as an idea has certainly prevailed that a debt due from a debtor resident in one country is to be regarded as situate in the country where he resides, and that the situation thereof is not affected by its being secured by way of mortgage on land in another country (see *Hanson*, Probate, Legacy, and Succession Duty Acts, 3rd ed., p. 159; *Lawson v. Commissioners of Inland Revenue*, '96, 2 I. R. 418); and this notion must now be considered of doubtful truth.

The inviolability of a company's capital is a wholesome doctrine, but one which may easily degenerate into a superstition, as *Lock v. Queensland Investment Co.* ('96, A. C. 461, 65 L. J. Ch. 798) illustrates. The argument as formulated in that case seems to have been this. A company cannot accept from a shareholder prepayment on his

shares and agree to pay interest on the amount prepaid if there are in fact no profits out of which to pay such interest: for if paid out of capital it constitutes a return of capital to the shareholders, and is illegal. This argument proceeds upon a misapprehension of the true nature of the transaction. The prepaid moneys are not calls at all. They are borrowed moneys—a loan by the shareholders to the company at interest—and there is nothing *ultra vires* in a company, like any other debtor, paying interest on such a loan out of capital, if it has no profits coming in. One of the advantages of incorporation—of constituting a separate legal entity in the person of the company—is that it can deal with its shareholders in such a matter as this of a loan, for instance, as if they were strangers. *Exchange Drapery Company* (36 W. R. 444) clearly shows the true nature of such prepayment of shares.

There exists a widespread belief that all questions as to joinder of parties have lost their importance. This error, which rests on the delusion that all questions having reference to pleading are merely technical and have no reference to the merits of an action, will, it may be hoped, be dispelled by *Sadler v. G. W. R. Co.*, '96, A. C. 450, 65 L. J. Q. B. 462. The House of Lords have here reaffirmed the perfectly sound principle that claims for damages against two or more defendants in respect of their several liability for separate torts cannot be combined in one action. If any one likes to say that this is a merely technical rule let him do so, but let him also, if he is a man of sense, admit that this rule of practice is, as every technical rule ought to be, bottomed on common sense. It is clear enough that nothing but confusion and injustice can result from allowing distinct causes of action against quite different persons to be combined in a common action against both of them.

It is to be hoped that the case of *Pitt Pitts v. George & Co.*, '96, 2 Ch. 866, C. A., will call the attention of Her Majesty's Ministers to the need for amending and consolidating the singularly ill-drawn provisions of the Copyright Acts. As that case shows, the wording of the principal Act of 1842 and the International Copyright Act of 1844 left it open to grave doubt whether the acquisition of English copyright by a foreign author under an Order in Council did or did not prevent the subsequent importation for sale of copies of a foreign copyright edition. The scale was turned by the argument from convenience. 'If the defendant's contention were correct,' said Lindley L.J., 'it would follow that a foreign author could assign his English copyright and import and sell copies of his work here in competition with his own assignee, unless prevented from so doing by express agreement.' Lord Justice Rigby's

judgment contains a historical and critical summary of our confused legislation, which will be found of great use by all persons interested in the subject.

The ancient Egyptians, according to Diodorus Siculus, expressly forbade advocates to plead in their courts on the ground that they darkened the administration of the laws. In *Carmichael's case* (96, 2 Ch. 643, 65 L. J. Ch. 902, C. A.) we have an instance of a lawyer's defence—no layman would ever have thought of it. *X* signs an underwriting letter addressed to a vendor-promoter offering for a commission of $7\frac{1}{2}$ per cent. to subscribe 1,000 shares, encloses an application for such shares, and agrees that the agreement and application shall be irrevocable and shall authorize the directors to allot him the shares. The promoter accepts those terms. The company issues its prospectus; the public does not come in; the promoter in pursuance of the authority sends in the underwriter's name to the company, and then the underwriter, finding himself in the net, bolts—that is to say, repudiates his contract and withdraws his authority. It is old law that you may revoke an authority though you cannot revoke a contract, but to do so you must make out that the authority is severable from the contract. In *Carmichael's case* it was part and parcel of the bargain, or, as the Court of Appeal put it, an authority coupled with an interest, 'Solventur risu tabulae.' These tripartite conditional contracts, commonly known as underwriting letters, require to be far more carefully drafted than they are, as Lindley L.J. recently remarked. Again and again the underwriters have of late slipped through the meshes of the net. The 'commercial conscience' makes no scruple of doing so if it can.

We are used to judge-made law, but never was there a bolder innovation than Lord Thurlow's invention of the restraint on anticipation. Those were the dark ages of woman's subjection, as John Stuart Mill called it, when husband and wife were still one, and the husband was *that one*, days when a husband exacted obedience to his wishes, and it hardly needed the shrewdness of Lord Thurlow to see that if the separate estate was to be made really effective, not a mere 'nominis umbra,' wives must not be allowed to deal with the income by anticipation; for what the wife could do, her husband could do. The wife had to be protected not only against her own extravagance, but against kisses or kicks. The equity lawyer with his immemorial talent for hair-splitting has now tried to introduce a distinction between property settled to the separate use and statutory separate property, arguing that the restraint is an incident of the one and not of the other (*Re Lumley*,

Ex parte Hood Barrs, '96, 2 Ch. 690, 65 L. J. Ch. 837, C. A.); but inasmuch as there is precisely the same reason for the protection in the one case as in the other, logic and common sense in the persons of the Lord Justices of Appeal rebelled at the refinement. The married woman is now making the best of two worlds—the disabilities of her former state of subjection, and the privileges of her emancipation.

There are certain well-known moves in the winding-up game, and one favourite move is the Chapel House Colliery defence. It is no use winding me up, says the Company, because all my assets are pledged and overpledged to debenture holders or mortgagees, and unsecured creditors like the petitioner can get nothing. This artifice has proved so successful in winding up that the defence—no assets—is now constantly tried in bankruptcy, though with varying fortune, as *Re Otway* ('95, 1 Q. B. 812, C. A.), *Re Leonard* ('96, 1 Q. B. 473, 65 L. J. Q. B. 393, C. A.), *Re Betts*, and *Re Birkin* (not yet reported) show. The point reached at present is, that if it is made clear that nothing will result from a receiving order but a heaping up of costs, the Court will not do what Jessel M.R. called a vain thing; but it takes a good deal more than the debtor's affidavit to convince the Court of this state of destitution. In *Re Birkin* the debtor set down a contingent reversionary interest, for instance, as worthless because he could not raise anything on it, a test of value which the Court declined to accept.

In old days the bankrupt was nailed by the ear to the pillory to extort disclosure. This heroic remedy has—perhaps unfortunately—become obsolete: but there is still a process in bankruptcy known as discovery of assets. There is also the public examination, and no one can possibly say nowadays what assets under stress of these proceedings may not be forthcoming, not to speak of what the undischarged bankrupt may earn beyond his maintenance. The no-assets plea in fact is not entitled to any sympathy, especially when it takes the form of saying (*Re Birkin*), I have a life interest worth £1,000 a year, and you will destroy it if you make me a bankrupt.

The late Lord Bramwell once said that the great thing to be done was to 'cheapen law—cheapen the administration of the law.' Cheapening has its dangers because low costs foster the litigious spirit, already quite rife enough. As it is, people recognize law as too expensive a luxury and acquiesce in their grievances, just as husband and wife do with the knot there's no untying. At present, however, law is undoubtedly too dear. It is not that solicitors are overpaid for their work, or counsel either, except one small coterie

of fancy fee specialists. It is the elaboration of our system of proceeding—the steam-hammer employed to crack a nut, a nut, too, which often proves a rotten one. It is to be hoped the long-expected New Rules will make some short cuts for us through the labyrinth of legal procedure. In the meantime it is satisfactory to find the Court of Appeal trying to keep down legal expenses by refusing the gratuitous extravagance of a commission to examine witnesses on a side, if not irrelevant, issue (*Ehrmann v. Ehrmann*, '96, 2 Ch. 611, 65 L. J. Ch. 745, C. A.). Helpless litigants do not know what is necessary and what is not. All they know is that they want their case presented in the best and most effective shape.

A small portion of a memorable State trial is recorded in the report of *R. v. Jameson*, '96, 2 Q. B. 425. The point of substance decided is that, where hostile preparations against a friendly State are once set on foot by any one 'within the limits of Her Majesty's dominions and without the licence of Her Majesty,' offences against the Foreign Enlistment Act may also be committed by other persons who assist in such preparations, even if they are not themselves on British territory at the time.

'Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*.' (The Married Women's Property Act, 1882, s. 1, sub-s. 5.)

Can a married woman who has incurred debts as a trader be made bankrupt under this enactment after she has sold her business, though she has not paid her debts?

The Q. B. D. (*In re Dagnall*, '96, 2 Q. B. 407, 65 L. J. Q. B. 666) answer that she can. The reply is satisfactory, since it is in accordance with common sense. Is it, however, in accordance with the words of the Act? The two judges who made up the Court have come to the same conclusion on almost inconsistent grounds. Vaughan Williams J. holds that a married woman can be made bankrupt only whilst she carries on a trade, but that as long as she owes trade debts she does carry on a trade. Wright J. holds that a woman having once carried on a trade continues liable to be made bankrupt for her trade debts even after she has ceased to carry on a trade. The views, moreover, of the two judges can hardly be reconciled with *Ex parte Schomberg*, L. R. 10 Ch. 172, and *Ex parte McGeorge*, 20 Ch. D. 697. The truth is that the policy of the Married Women's Property Acts has in this instance, as in others, placed the judges in an absurd dilemma. They are forced either to come to a conclusion which is almost ridiculous, or to strain the words of the Acts.

The only way, we are convinced, in which to render the law as to married women rational and intelligible is to place a married woman, as regards rights and liabilities arising from possession of property or from contracts, in the same position as a *feme sole*.

No one legal term is so ambiguous, or has through its ambiguity caused so much confusion of thought as the word 'property.' It is satisfactory to find from *Brooke v. The Commissioners of Inland Revenue*, '96, 2 Q. B. 356, 65 L. J. Q. B. 657, that the Courts are refusing to increase the confusion both of lawyers and laymen by holding that a trade-mark and a goodwill, though of great pecuniary value, are not property within the meaning of the Stamp Act, 1891, s. 59, sub-s. 1. There is reason to hope that it will at last be generally recognized that property consists of saleable rights, and that the goodwill of a business is as truly property as an estate, or, in other words, as a man's rights over land. These remarks are not addressed to equity lawyers, among whom there could not have been any doubt on the matter within this century. In justice to the unsuccessful appellants it must be mentioned that they did not venture to argue that trade-marks and goodwill are not property at all, but only that they are not property within the meaning of the Stamp Act unless attached to a manufacture or business actually carried on within the jurisdiction.

Reg. v. County Council of West Riding of Yorkshire, '96, 2 Q. B. 386, 65 L. J. M. C. 136, follows *Sharp v. Wakefield*, '91, A. C. 173, and does not establish any new rule of law, but it has nevertheless considerable practical importance. It shows that a County Council in cases in which it is called upon to exercise discretion may, as long as the Council acts without unfairness, exercise its discretion very freely. We may perhaps draw the further inference that where the carrying on of a business, e.g. the performance of stage plays, depends upon a licence to be granted by a Council, it is at any rate possible that the Council may in every particular case attach conditions to the licence which they could not attach to licences to be granted by them by laying down a general rule on the subject. Suppose, for example, that the Council of the West Riding objects on principle to drink being sold at a theatre. The Council might perhaps exceed its powers if it laid down that no licence for the sale of drink should be granted in respect of any theatre in the West Riding, but the Council may legally attain the same end by refusing a licence to every owner of a theatre who has to apply for it. We do not assert that this state of things is unreasonable, but we do assert that it is a condition of affairs under which the public should narrowly watch the exercise of discretionary power by

local authorities. Individual freedom may be as easily curtailed by the despotism of local tyrants as by the tyranny of the central government.

Estoppels by judgment we know, but with the progress of that refined science, Equity, we have reached a new development—what may be called equitable estoppel by judgment (*Re Lart, Wilkinson v. Blades*, '96, 2 Ch. 788, 65 L. J. Ch. 846). The common law estoppel by judgment applies only to parties and privies. Its equitable analogue applies to persons who have acted as if they were parties, persons who stand by knowing what is passing and see the battle (say of will construction) fought by somebody else—even accept part of the spoils—and then years afterwards want to begin a fresh battle and contest the construction arrived at over again because they were not technically parties. Chitty J. has decided that this cannot be done, and the multitude of persons interested in Chancery suits makes such a decision a very salutary one. If there is anything in the *fuis litium* doctrine, it ought to apply here.

We accidentally omitted to notice in the last number a case of some interest reported in July, *South Staffordshire Water Co. v. Sharman*, '96, 2 Q. B. 44. It will be seen in our review columns that it has already been adversely criticized, but we think it correct. Two gold rings found at the bottom of a pool on land held by the water company in fee simple in possession were decided to belong to the company and not to the finder. The different decision in *Bridges v. Hawkesworth*, 21 L. J. Q. B. 75, was also correct, but turned on the special fact of the loss and finding having taken place in the public part of a shop, so that the lost notes were never within the occupier's protection or control. The general power and intent of the possessor of land to exclude unauthorized interference imply, as a rule, possession of whatever is on the land, known or unknown to him.

The highwayman who came into Chancery for an account against his partner was no legal myth, as was shown not long since in these pages (L. Q. R. ix. 197), but matter of recorded law. We now have the poacher aspiring to similar fame. He—this bold poacher—had been convicted of night poaching and had lost his liberty, but would not lose his nets also. So he sued the landowner who had seized them for 15*s.*, the value of the nets, and 5*s.* damages for detention, and the Court, like that of Venice, found itself constrained to give judgment for an unmeritorious plaintiff. The Night Poaching Act of 1839, in giving landowners power to

apprehend offenders, forgot, it seems, to provide for the forfeiture of their appliances. But the Court resolved that the presumptuous poacher should have merely justice. So it valued the nets at 1*d.*, and fixed the time for restoring them at six years from that date, in the hope that by that time the converted poacher might have become a gamekeeper; and the curtain fell on the plaintiff deprived of his costs and the defendant paying one penny into Court. So perish all false litigants!

The collapse of the Liberator Group and of the Australian Banks caused what may be termed a spate in the winding-up department. Officialism is now returning to its ordinary channel and the normal flow of business becoming defined. One thing emerges clearly from the last Companies Return—albeit it is no new revelation—and that is that there is an overwhelming preference for the process of voluntary winding-up. The companies which have chosen in 1895 what Page Wood V. C. called the ‘domestic forum’ are 900 as against 90 which have been wound up by the Court. Of course, says the cynic, their antecedents will not bear the light; there are directors with a past who shun investigation. But this suggested fraud, this phantom of the imagination, will not explain the phenomenon. It is found just the same in bankruptcy, where almost as many insolvent estates are liquidated privately as in bankruptcy, and where the same suggestion of fraud is as erroneously made. The real explanation is the Anglo-Saxon characteristic of self-help—a deeply-rooted antipathy to officialism. There still remains a residuum of cases which can best be dealt with by an official liquidation—cases where the assets are so small as not to be worth creditors troubling themselves, or where fraud is proved; but the mere need of investigation is not ground enough for ordering a compulsory, in lieu of a voluntary, winding-up. S. 115 enables a liquidator to ferret out everything that is necessary. That section used to be deemed so inquisitorial that it got the name of the Star Chamber clause. Yet the Inspector-General thinks it inadequate, because creditors cannot attend and examine as they can at the public examination; but the ‘heckling’ of directors is really not part of the policy of the Act.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

COLLISIONS AT SEA WHERE BOTH SHIPS ARE IN FAULT.

AN article upon the above subject (in which the present writer assisted) by Monsieur Louis Franck, Advocate in Antwerp, and Professor of Maritime Law at Brussels, appeared in the LAW QUARTERLY REVIEW for July, 1896. In this article Monsieur Franck considered the various rules, by which the Courts in different countries deal with the question of collision damage, when both ships are in fault; with the object of convincing those interested in maritime law, that the proportional rule is a fairer method of dealing with collision damage than the British rule of dividing the loss.

If minor or collateral differences be disregarded, there are amongst civilized nations four different ways of dealing with collision damage where both ships are in fault:

1. To mass the total damage and divide it equally between the two ships.

This is the British rule and has been the American rule; but the case of the *Victory* and the *Plymothian*, 68 Fed. Rep. 395, both by the dicta contained in it and by the finding, seems to show that the rule is not now accepted as settled law in all parts of the United States.

2. To leave the loss where it falls.

This is the rule in Germany, Holland, Italy, Spain, and those of the South American States which have derived their law from Spain, and was the rule in Great Britain in our Courts of Common Law previous to the Judicature Act, 1873.

3. To divide the loss proportionally to the value of the vessels in collision.

A kind of general average principle obtaining in Turkey and Egypt¹.

4. To divide the loss proportionately to the faults of the two vessels.

This is the rule of France, Belgium, Norway, Sweden, Denmark,

¹ This rule is applied in the International Mixed Courts. The Egyptian Codes, followed in the Native Courts, practically embody the French Code, adopt the proportional rule; but it is in the highest degree unlikely that any collision case will ever come before the Native Courts, so long as the Mixed Courts continue to exist; because it is hardly possible but that some European should be interested in every case of collision, and therefore entitled to have the case brought before the Mixed Courts.

Portugal, Greece, and Roumania. The words of Art. 229 of the Belgian Code de Commerce are as follows :—‘S'il y a faute commise à bord des deux navires, il est fait masse des dommages, lesquels sont supportés par les deux navires dans la proportion de la gravité qu'ont eue les fautes respectivement constatées comme cause de l'événement.’ The French Code de Commerce does not contain an article dealing explicitly with the point, but the rule is accepted as implied by Article 407.

It should be borne in mind that other rights, remedies, and liabilities incidental to, or connected with the rule of collision damage are not necessarily similar in all countries, in which the rule of collision damage is similar—such as for instance the rights of the owners of cargo or the liabilities of the master.

Monsieur Franck sets on one side the Turkish general average rule, as absurd. The rule of leaving the loss where it falls he considers very briefly; for his concern is with British opinion, and British opinion discarded the last shreds of that rule in 1873. His article accordingly resolves itself into a comparison of the rule of dividing the loss with the proportional rule.

It may be summed up under the three following heads of argument.

1. The culpability of the respective ships varies in every collision, and justice requires that their liability should vary accordingly.

But the rule of dividing the loss by halves is inflexible and does not permit of such variation of liability.

2. The proportional rule on the other hand is flexible and does permit of such variation of liability.

Therefore it satisfies the requirements of justice better than the rule of dividing the loss.

3. Experience proves that this is so; because

(a) The rule has in numerous cases in France and Belgium better satisfied the requirements of justice than the rule of dividing the loss could have done. (Monsieur Franck gives a *résumé* of such cases.)

(b) The rule is easy of application, ‘a matter of common sense, not algebra.’

(c) It gives rise to no indirect disadvantages such as frequency of appeals.

Put in this short form, Monsieur Franck’s argument at once suggests this criticism: ‘You have pointed out to us why our British rule is theoretically bad, and why your rule is both theoretically and practically good: but our rule in practice works well, and we labour under no sense of its injustice—we have no

grievance. Why should we change it? Give us a practical as well as a theoretical reason, and then we will give your rule consideration.'

Now Monsieur Franck has not, except incidentally, dealt with the practical working in Great Britain of our rule of dividing the loss: and, in view of our national disinclination to any change made merely to satisfy a theory or complete a system, it may be well to supplement Monsieur Franck's article with some consideration of (1) the practical working of the British Rule, (2) objections to the change from the British point of view, and (3) the real reason why it is to the interest of the shipping community of Great Britain that the proportional rule should be adopted in our Courts.

I. THE PRACTICAL WORKING OF THE RULE OF DIVIDING THE LOSS.

1. *The history of the rule.*

It will be well to digress for a moment to the history of the rule, and for this reason. There is absolutely nothing sacred about the rule. It is not an organic principle of our law maritime, and we owe it no respect as an original doctrine of our ancient constitution. Its origin is obscure, but one fact appears clearly—that the rule was not originally applied where both ships were found to blame, but in cases of doubt, where it was used as a rough and ready mode of settling the dispute, a rough attempt at justice such as might be made by common folk—*a judicium rustigorum*, as it was called. It came to be applied to cases of 'both to blame' by what cannot be regarded as other than a mere chance. From the year 1677 onwards through last century the rule was spasmodically applied with arbitrary impartiality to cases of doubt, of inevitable accident, of one ship to blame, and finally of both to blame; and it was not until after the rule had been applied twice in the year 1789 to the case of both ships to blame, and Lord Stowell had in the years 1815 and 1816 pronounced dicta, that such was the proper application of the rule, and the House of Lords had in 1824 adopted the rule¹, that the practice became settled; in fact it was not till the judicial custom of following precedents, and whether the principle they embody be good or bad, had crystallized into a rule of practice and become binding on judges as a fundamental principle of English

¹ *Hay v. Le Neve*, 2 Sh. App. 395. In this case the Court below had apportioned the damage in the relation of one-third to two-thirds, and the House of Lords overruled this finding, and substituted division of the loss by halves.

law, that the Admiralty Court really adopted the rule of dividing the loss where both are to blame. But, as already mentioned, the rule was accepted only by the Admiralty Court, and not by our Courts of Common Law, which, when actions for collision at sea came before them, continued to apply the rule which still governs actions for negligence at common law—namely, that where the plaintiff as well as the defendant is to blame the damage is presumed to have been caused by the plaintiff; in other words the loss lies where it falls. This curious anomaly of the two rules co-existing was allowed to remain until the Judicature Act of 1873. In that year, when public opinion had pronounced in favour of a general unification of our system of procedure, this divergence between Admiralty and Common Law practice came, with other anomalies, under the eye of reform, and the Admiralty rule was made to prevail in all the Courts in all cases of collision between ships. But it is a fact of some interest that in the Judicature Bill as introduced into Parliament, the draft clause dealing with this point proposed, not that the Admiralty rule, but, on the contrary, that the Common Law rule should prevail in all Courts, including the Admiralty Court; and it was only in Committee that the clause assumed its present shape. So that even so recently as twenty-three years ago opinion was by no means unanimous in favour of our Admiralty rule of dividing the loss. However it is equally clear that by the majority the Admiralty rule was regarded as more satisfactory than the Common Law rule, and Monsieur Franck is probably correct in saying, that the change was largely dictated by a feeling, that the rule of dividing the loss was fairer than the rule of leaving the loss to lie where it falls; and, as he says, division of loss by halves is one step on the road to the proportional division of loss.

2. *The rule of dividing the loss an intermediate step between the Common Law rule and the proportional rule.*

That the Admiralty rule is really an advance upon the Common Law rule in the direction of apportionment according to blame will be made clear by a comparison of the two rules.

The theory of the Common Law rule is based upon an assumption of certain facts (inaccurately expressed in the phrase 'contributory negligence'): (1) that the defendant has committed a breach of his duty of care towards the plaintiff; (2) that the plaintiff has been careless in the conduct of himself or his property; and (3) that the plaintiff's careless act, or want of care, has been the cause of the accident. From this the inference follows, that the plaintiff has only

himself to blame and must therefore pay his own damage (cf. the analysis of the law of contributory negligence in the judgment of Lord Bowen in *Thomas v. Quartermaine*, 18 Q. B. D. at p. 697).

This theory of assumed facts is in no case easily justified, but is, in the ordinary Common Law action for negligence, where the plaintiff alone has suffered damage, at least intelligible. But where the defendant as well as the plaintiff has suffered damage, and the defendant brings a cross action, or a counter-claim, and the two causes of action are heard together, the Common Law theory leads to an absurdity—as, for instance, where both ships are to blame and both suffer damage. In such cases there were originally cross actions (now represented by claim and counter-claim). By the Common Law rule ship *A* could not recover because *her* negligence was the immediate cause of the collision, and ship *B* could not recover because *her* negligence was the immediate cause. And yet the act of each could not be the immediate cause; so that a judgment so deciding could not be right in both cases.

It follows from the above consideration that the Common Law rule not only does not apportion the blame at all, but, by adopting the fiction that each ship, being solely responsible for her own damage, is not responsible for the damage to the other, holds in effect that neither ship is to blame!

The true view of the matter is that where two ships are both to blame, each ship has been guilty of a breach of duty towards the other, and those breaches of duty in their combined operation together constitute the cause of the collision. And the advance made by the Admiralty rule over the Common Law rule lies in the recognition of this fact. For, whereas the Common Law rule assumed in every collision that the plaintiff in each cross action had by his own carelessness caused his own damage, the Admiralty rule assumes that the damage to each ship is caused partly by the plaintiff's own carelessness, but partly also by the defendant's negligence. In accordance with this view, the Admiralty rule decides that each ship must pay a *part* of that damage of which she has been *partly* the cause, and to this extent makes an apportionment according to blame. But the Admiralty rule by fixing the liability inflexibly at one half, whatever the degree of responsibility, falls short of the proportional rule. Another, and perhaps a truer way of stating the difference between the division of loss rule and the proportional rule is, that whereas the former arbitrarily assumes that each ship is responsible to an equal extent for the collision, the latter seeks to ascertain to what extent each ship is responsible; both rules dividing the damage proportionally to the measure of responsibility attributed to each ship by the Court, which

is in the one case invariably one-half, in the other case whatever may have been the actual proportion found by the Court¹.

3. The results of the rule of dividing the loss.

In a leading article in the *Shipping Gazette* of October 9, 1896, upon Monsieur Franck's article, it was remarked that 'cases where both vessels have been navigated with gross and obvious negligence are probably less common than those in which it is clear that the chief blame is on one side, while on the other there has been some venal fault only, such as an omission to stop and reverse quite as soon as would have been proper.' This opinion is expressed by a recognized mouthpiece of the shipping community, and it receives corroboration from the following facts. In the great majority of collision cases one ship is obviously to blame and no defence is attempted. Such cases are settled out of Court. According to the reports in the *Shipping Gazette* there were fifty-three cases heard in the High Court during the last legal year; in thirty-nine one ship alone was held to blame, and only in the remaining fourteen were both held to blame. Collision cases thus fall into a kind of graduated scale, at one end of which are the cases where one ship is clearly to blame, and the other clearly blameless; at the other end of the scale are the cases where both ships are clearly to blame in an equal degree. In all cases that come into Court there is doubt as to where the blame rests: but in those cases which lie on the border line between 'one alone to blame' and 'both to blame' the probability is very strong that (1) neither ship is in reality blameless, and (2) one ship is very much more to blame than the other.

In many cases of both to blame it is doubtless the fact that both are equally to blame, and in such cases our rule works equitably—as equitably as the proportional could. But in the border-line cases above referred to where both ships are in fault, but one much more than the other, the rule of dividing the loss produces two effects which are unjust. (1) Where the decision is 'both to blame,' the less culpable ship is mulcted in a larger share, and the more culpable ship in a smaller share of the total damage than they respectively merit; and the greater the disparity between their respective faults, the greater the injustice. (2) Where the decision is 'one alone to blame,' the injustice is reversed; the more culpable ship pays the whole of the damages, when it only deserves to pay

¹ In this context the case of *Raisin v. Mitchell*, 9 C. & P. 613, which was tried at common law, is noteworthy. In that case a barque ran down and sank a sloop, being herself uninjured. The value of the sloop was £500, but a verdict for £250, on the ground that 'there were faults on both sides,' was allowed by Tindall C.J. to stand.

a part, and the less culpable, which also ought to pay a part, pays nothing: and the smaller the disparity between their respective faults, the greater the injustice. An instance will make this clear.

Ships *A* and *B* are in collision, and the total damage to the two ships amounts to £1,000. *A* was responsible for the collision to the extent of three-fourths, *B* to the extent of one-fourth (e.g. *A* and *B* were both going at an excessive speed in a fog: but *A* was also on the wrong side of a narrow channel; and had no look-out or lights). The alternatives open to a British Court are 'both to blame' and '*A* solely to blame.' Which is the fairer? A judgment of 'both to blame' by which each pays £500? In this case *A* pays £250 less and *B* £250 more than they respectively deserve. Or should it be '*A* alone to blame'? In this case *A* pays £250 more and *B* £250 less than they respectively deserve.

It may be objected that judges do not ignore breaches of the regulations, as suggested by the foregoing illustration, and that as a fact no such alternative exists to the judge. To this objection it may be answered, that, though by the statutory presumption of fault, the breach of any regulation, when once such regulation has become operative, carries with it an equal amount of blame, yet, in the first place, there is often a doubt as to whether the facts at any given moment prior to the collision had brought the rule into operation, and secondly, some rules are much more easy to ignore than others: e.g. Rules 13, 18, and 22 (speed in fog, slackening and reversing, and holding on). And it will be admitted by those familiar with Admiralty proceedings that there is a tendency to ignore slight negligence, in order to avoid the injustice of inflicting upon the slightly negligent ship so large a measure of damages as one-half. The practice is by some thought to be common—particularly so in the case of steam and sail. If it is so, the inflexible character of our rule must be held responsible for the fact.

4. *Cases illustrating the unfairness attendant upon the rule of dividing the loss.*

If the British rule works thus unjustly, it might be expected that ample evidence would be forthcoming from the law reports. This is not the case, and for two reasons; (1) the statutory presumption of blame, (2) the rule of dividing the loss equally. The effect of the statutory presumption is to obviate the necessity of any comparative estimate of the facts in evidence; for the breach of any one regulation is sufficient to raise the statutory presumption, and establish the fact of responsibility. And the

bare fact of responsibility being established, the rule of dividing the loss makes it unnecessary to inquire into degrees of responsibility. The same evidence is required for the application of either rule: but for the above two reasons it is not necessary for a proper comprehension of the case to report the evidence as fully under the rule of dividing the loss as under the proportional rule: hence it is that amongst reported cases there are not many which clearly illustrate the unfairness of the rule of dividing the loss.

However, there are amongst the reported cases of the last five years some few, which will illustrate the two ways in which the rule of dividing the loss may be unsatisfactory: viz. (1) where a judgment of both to blame imposes upon the less negligent ship a heavier burden and upon the more negligent ship a lighter burden than they respectively deserve: (2) where the wish of the Court to avoid this injustice leads it into shutting its eyes to the negligence of one ship (which may have been slight, but was none the less real), and thus to let it go unpunished for its wrongful acts; and to impose upon the other ship the burden of making good the whole of a loss for which she is not wholly responsible.

In these cases, it is submitted, justice would have been better done by applying the proportional rule had that been possible. Aspinall's reports are followed:—

1. *Where the judgment of both to blame has been unfair.*

The *Lancashire*, '93, P. 47, '94, A. C. 8, and 7 Asp. M. L. C. 352, 376.

The *Lancashire* and the *Ariel* (both steamships) were at 8.0 p.m. on June 10, in a fog in the English Channel. Held, that the primary cause of the collision was the wrongful porting of the *A.*, but further (following the rule laid down by the *Ceto*, 14 A. C. 670, and 6 Asp. M. L. C. 479) that the *L.*, though she stopped on hearing the whistle of the *A.*, was to blame for not reversing on hearing it a second time, on the same bearing as the first; because 'the indications were not such as to show to the captain of the *L.* distinctly and unequivocally, that if both vessels continued to do what it appeared they were doing, they would pass clear without risk of collision.'

In this case it is clear that the *A.*, by altering her course before she knew the bearing and course of the *L.*, converted a position of security into one of imminent danger, and was in the main responsible for the collision. In comparison, the omission of the *L.* to reverse at once was a slight act of negligence. Surely it

would have been fairer to divide the damages into two-thirds and one-third, or three-fourths and one-fourth?

The *Talbot*, '91, P. 184, and 7 Asp. M. L. C. 36.

At 4.15 a.m. on a December morning the *Talbot*, inward bound, was heading across the Mersey from the west side under a starboard helm, to enter the Salisbury Dock; the *Stanley Force* was coming down the river from above the Salisbury Dock, and had the *T.* somewhere on her port bow. The *T.* was carrying, in addition to her regulation lights, a white globular light at the mizen truck, as the usual customs signal for a vessel coming from a foreign port (but no custom was proved). A collision occurred off the Salisbury Dock. The *S. F.* was held to blame for a bad look-out, because apart from the fact that the *T.*'s green must have been open to her for some time, she ought to have seen that the *T.* was coming across the river. But the *T.* also was held to blame: per Butt P. 'The mizen truck light of the *T.* was about double the height of the forward light, and the two might have appeared to be anchor lights (Mersey Rule 4). Whether the *S. F.* was misled is doubtful. . . . Therefore, though I am not satisfied that the *S. F.* was misled by the light, still, as it was not necessary for the *T.* to depart from the regulations, and as on the evidence it is doubtful whether the *S. F.* might not have been misled, I must hold, under the Act of Parliament, that the *T.* is also to blame.'

It is interesting to note disinclination of Butt P. to saddle the *T.* with any blame, doubtless due to the fact that the main cause of the collision was the negligence of the *S. F.*

The *Queen Victoria*, 7 Asp. M. L. C. 9.

The *Ovington* (steamship) was, at 2.0 a.m. on Dec. 29, swinging athwart the line of navigation in the Clyde before coming to an anchor. Her regulation lights were burning brightly, including a white stern light. Under these circumstances the masthead and red of the *Queen Victoria* were observed 200 yards away, two or three points abaft the beam on the port side. The *Q. V.* then suddenly opened her green and a collision immediately followed. Held, both to blame; the *Q. V.* for bad look out, the *O.* for not having a look out aft.

The negligence of the *Q. V.* who is navigating in a crowded channel like the Clyde, where she ought to be prepared for ships anchoring or other impediments to free navigation, with so bad a look-out that she gets within 200 yards of a steamer lying right athwart her path with her lights properly burning, before she sees her, or observes that her lights are broadening or narrowing, is surely far greater than that of the *O.*, who fails to have a look-

out aft in addition to her stern light? Would not three-fourths and one-fourth be a fairer distribution of the damage than one-half and one-half?

The *Juno*, 7 Asp. 506, is a similar case to the *Queen Victoria*.

In the *Germanic*, *Journal of Commerce*, Feb. 22, 1896 (where there is a verbatim report of the judgment), it was held that both the *Germanic*, her engines revolving at 'slow' and making a speed of seven knots through the water, and the *Cumbræ*, making six knots, were to blame for excessive speed in a fog; but the *C.* was also held to blame for navigating on the wrong side of a narrow channel. In point of fact the one fault attributable to the *G.* was that her speed with her engines working at slow was too high to permit of obedience to article 13, except by stopping her engines altogether from time to time in order to take way off her. But even assuming the fault of each vessel in respect of speed to have been equal, there remains the very grave additional fault of the *C.* in being on the wrong side of the channel. The *G.* avoided liability by the defence of compulsory pilotage: but assuming that she had not been under charge of a compulsory pilot, then would the division of the loss by halves, or into say one-third and two-thirds have been the fairer? The *C.* was guilty of two faults, the *G.* of one: does not this suggest the apportionment into two-thirds and one-third?

The *Barrister, Shipping Gazette Weekly Summary*, July 10, 1896.

The *Coulor* was a barque of 382 tons register and the *Barrister* a steamship of 4,780 tons register. On a dark night the *B.* overtook the *C.*, ran into her stern and sank her. Held by Jeune P. and affirmed by the Court of Appeal, that the barque failed to exhibit any stern light or flare-up or to indicate her existence to the overtaking steamer whose lights were visible; and was therefore to blame; but that the *B.* was also to blame: 'The Trinity Masters tell me that in their view the sailing vessel ought to have been made out. It is impossible to suppose that the night was so dark that nothing could have been made out. Perhaps they might have seen the loom of the sails, or the water turned up in the wake of the sailing vessel, or perhaps some intimation of her lights. One or all of these things ought to have attracted the attention of a really efficient and vigilant look-out on the part of the following vessel. I cannot help thinking that they ran down the other vessel without seeing her at all, and that she had vanished into the darkness before they realized that they had run into her.' It cannot be maintained in this case that the two vessels were equally to blame; three-fourths and one-fourth it is submitted would have been a fairer apportionment of the damage.

Pritchard's Admiralty Digest contains this startling reference to a Scottish case. (Collision 203), 'Collision: two-thirds of the damage attributable to the conduct of the defendants and one-third to the plaintiffs. Damages divided. *Brettcher v. Carron Co.*, 23 Court of Sess. Cas. 323.

2. *Where the judgment is 'one to blame,' but the finding of the Court seems to have overlooked certain negligence in the other ship.*

The *Faedrelandet* (steamship), '95, P. 205, and 8 Asp. M. L. C. 1, was riding to her chains with her anchors unshackled S.E. of the Goodwin Sands, with an anchor light on her forestay and a white globular light aft. Under these circumstances the barque *Aepasia* mistook the lights of the *F.* for the masthead and green of a steamer under way and kept on her course. At the last moment a flare was burnt, a bell rung, and the helm put hard down; but a collision occurred. Held, that the *F.* was unmanageable and should have carried the three red lights and was therefore solely to blame.

In this case it is submitted that the reports point to the inference that the *A.*, with a better look-out, might have averted the consequences of the *F.*'s breach of the regulations. If this inference is correct, the *A.* was not blameless, though her blame was less than that of the *F.*, whose fault was the primary cause of the collision.

Is this a case where the Court has shrunk from imposing the penalty of half damages for a fault that merits a lighter penalty?

The *P. Caland* ('91, P. 313, '92, P. 191, '93, A. C. 207, and 7 Asp. M. L. C. 83, 206, 317) was proceeding slowly off the Varne Shoal in imminent danger of her engines breaking down, and was carrying three red lights to indicate she was unmanageable. The *Glamorgan* collided with her. Held, in all Courts, that the *P. C.* was not unmanageable, and was not justified in hoisting the three red lights, and was therefore to blame. The question whether the *G.* was also to blame depended on whether the *P. C.* had her red side-light duly exhibited. If she had, then the *G.* was to blame for approaching too near her, or for bad look-out: if she had not, then the *G.* was in no way to blame for not knowing that the *P. C.* was under way, and her course was justifiable.

The two lower Courts came to the conclusion that the *P. C.*'s red side-light was as a fact not exhibited, and the House of Lords refused to disturb the finding. But Herschell L.C. says, 'Weighing all the probabilities, I confess I should myself be disposed to come to the conclusion that the red side-light was visible, and that those on board the *G.*, having observed the three masthead and red lights, and being aware that they were approaching a disabled

vessel, took it for granted that she was at a standstill, and their observations being directed under this impression, to the masthead lights, they failed to observe the red side-lights and accordingly bore down upon the *P. C.* under the impression that she was stationary.'

Might not the possibility of dividing the damages in the proportions of say four to one have altered the views of the two lower Courts? And might it not also have prevented two appeals?

II. OBJECTIONS TO THE CHANGE.

1. *The difficulty of making quantitative distinctions in the degrees of blame.*

At first sight the apportionment of the blame may wear the appearance of an impossible task. How, it may be urged, in a case where each of two ships has been negligent, can a judge say whether ship *A* has been twice as negligent as ship *B* or only half as negligent again? The answer is, firstly, that the proportional rule is to be applied only where such quantitative distinction in fact exists, and secondly, that, where the distinction really exists, there it will be obvious. And experience shows this to be so. Monsieur Franck in his article enumerated many cases; in none of them did the Courts find any difficulty in apportioning the blame; and the blame was apportioned for the very reason that the justice of such apportionment was obvious, and if it had not been obvious no apportionment would have been made, but a mere division by halves. Secondly, consideration of the English cases above abstracted shows clearly that such quantitative apportionment of the blame is simple, and simple because obvious. For example in the case of the *Germanic*, the responsibility of the *Germanic* was to that of the *Cumbræ* as one to two—if the two faults of excessive speed in a fog, and navigation on the wrong side were, under the circumstances, of equal gravity; that is to say, the *Germanic* should have paid one-third and the *Cumbræ* two-thirds of the total damage (the irrelevant matter of compulsory compilotage being eliminated). Thirdly,—and this point is important,—the change would involve no additional evidence, and would make the proceedings in a case neither longer nor more complicated.

Finally if Belgian and French judges can apply the rule, English judges can also.

2. *The assessment of the damage.*

Under the proportional rule, as now in all collision cases, whether one or both ships be to blame, the damage would be assessed in the

Registry and then divided between the two ships, by a simple adjustment, in the proportions named in the finding of the Court.

3. *The risk of appeals.*

The great stumbling-block in the way of the adoption of the rule in Great Britain seems to be a belief that the rule would lead to an increase of appeals. It is difficult to know the cause of this belief, but the following considerations seem to afford a sufficient answer. Firstly, appeals on the proportions, in which the blame is allocated by the Court, are appeals on a question of fact, and must be subject to the restrictions which limit other appeals on questions of fact. Secondly, being appeals against the amount of damages, they are appeals from the discretion of the Court below, and subject to even greater restrictions. Thirdly, there are grounds for thinking that appeals under the proportional rule will (so far as that rule may introduce new conditions) be treated by the Court of Appeal much as it now treats appeals against the quantum of salvage awards. Under the present rule of dividing the loss the Court is concerned solely with ascertaining the *quality* of the conduct of each ship—i.e. whether the two ships are respectively to blame; and is not concerned with the *quantity* of blame—i.e. to inquire how much each ship is to blame, or whether one ship is more to blame than the other: or, to put the same fact in a concrete form, the breach of one regulation raises the presumption of blame to no less a degree than the breaches of a dozen regulations. But once admit the proportional rule, and the question before the Court must be regarded in an additional light. When the Court has decided upon the evidence that each ship has broken one or more regulations, and is therefore to blame, it will proceed to weigh *quantitatively* the facts so found, and to say whether one ship is more to blame than the other, and, if so, how much more. The Court, in thus weighing the various breaches of regulations or other acts of negligence already proved to its satisfaction, performs an operation, which our rule of dividing the loss never requires; and it is in this particular that appeals under the proportional rule will differ from appeals under the present rule. Now this process, which will distinguish the decision of a case under the proportional rule, is in its nature an estimate made by the Court, in the use of its discretion, of a question of fact: and is analogous to the quantitative estimate of the services of salvors,—also a question of fact,—which, when the quality of the services has been determined and the right to salvage remuneration established, the Court proceeds to make in every salvage case. And as appeals from this

quantitative estimate, made in the discretion of the Court, of the value of salvage services are discouraged by the Court of Appeal, so, it is submitted, will appeals be discouraged from the quantitative estimate of the blame, which takes the form of an apportionment under the proportional rule. The following cases illustrate the attitude of the Court of Appeal to appeals on the quantum of salvage awards. If the analogy suggested above be sound, these cases will be material to any discussion of appeals under the proportional rule.

The *Amerique*, L. R. 6 P. C. 468, at p. 471, per Sir James Colville L.J.

'The appellants contend the sum awarded by the learned judge is out of all proportion to those services, and on the ground of its exorbitancy ought to be reduced by this tribunal sitting as a Court of Appeal.'

'The jurisdiction thus invoked is one which this Committee, and also as would appear from the *Cuba*¹ the Court of Admiralty, when sitting as an appellate Court, has always been slow to exercise. The general rule of non-interference has been within the last few years stated and enforced at this Board in the *Clarisse* and the *Neptune*, both reported in 12 Moore's P. C. Reports; the *Carrier Dore*², the *Fusilier*³, and the *England*⁴. The general rule is nowhere better stated than in the *Clarisse*, in which Lord Justice Knight Bruce said, "It is a settled rule, and one of great utility with reference to cases of this description, that the difference (that is the difference between the sum awarded, and that which the appellate Court may think ought to have been awarded) must be very considerable to induce a Court of Appeal to interfere upon a question of mere discretion."

'... To establish a case for the exercise of this exceptional and delicate jurisdiction it would obviously be material to show that the judge of first instance, in estimating the amount of remuneration to be awarded, had miscarried, by allowing his judgment to be influenced by something which ought not to have influenced it at all; or else either by giving undue consideration, or by failing to give due consideration, to some circumstance fairly within his consideration.'

The *Farnley Hall*, 46 L. T. (N. S.) 216, at p. 219, per Brett L.J.

'In this case we labour under the great difficulty of having to interfere with the action of the Court below in awarding compensation for salvage, because it is against our desire to interfere in such cases, and we do not wish to deviate from a rule which we

¹ 1 Lush. 14; s. c. 6 Jur. (N. S.) 152.
² 3 Moore P. C. (N. S.) 269.

³ 2 Moore P. C. (N. S.) 243.
⁴ 5 Moore P. C. (N. S.) 344.

have laid down. The circumstances of this case, however, seem to us somewhat peculiar.'

The *Star of Persia*, 6 Asp. M. L. C. 220, at p. 221, per Lord Esher M.R.

'The rule has been correctly stated by Mr. Bucknill that if this Court cannot say that the learned judge has misapprehended the facts, and cannot say that he has acted contrary to any principle, then, if the amount does not seem to be unreasonable, it cannot interfere.'

III. THE REASON WHY IT IS TO THE INTEREST OF THE SHIPPING COMMUNITY OF GREAT BRITAIN THAT THE PROPORTIONAL RULE SHOULD BE ADOPTED.

It might well be thought that the foregoing considerations in respect of the rule which divides the loss, if sound, form a sufficient reason for abandoning that rule in favour of the proportional rule. But this opinion would not be warranted. As is well known to all acquainted with shipping questions, the grievance which might well be expected to result, does not to any great degree in fact exist. In one mode or another British ships are with few exceptions insured against the full extent of the collision risk—usually to the extent of three quarters by the running down clause of a Lloyd's policy, and for the remaining quarter in protecting associations; sometimes by an arrangement of mutual assurance, or in the case of large fleets by an insurance or reserve fund belonging to the owners to which premiums are credited and losses debited. The result of this practice is firstly, that each risk is distributed over a wide area, and secondly, that upon the doctrine of averages the average is a mean neither high nor low. In one case the amount payable is unfairly high, in another it is unfairly low; but the mean is in the long run fair. Hence, whilst shipowners are covered against the risk of an unduly heavy liability, underwriters and associations on the other hand, on the average of a number of payments, suffer no hardship. The suggestion has been made that the growth of single ship companies in recent years has accentuated the unfairness of the British rule, but the suggestion is groundless; single ship companies insure their collision risk as invariably as any other kind of owner.

But though it may be true that the habit of insuring prevents the unjust effects which would otherwise flow from the rule, it may be urged with equal truth that the same habit would prevent practical injustice were our rule that of leaving the loss where it falls; or even did our law refuse a remedy at all in case of collision at sea: which is a *reductio ad absurdum* of the objection to the

change founded upon the fact that the habit of insurance deprives our rule of any practical tendency to work injustice.

But it is well to admit candidly that the reason for suggesting the adoption of the proportional rule is not that the rule of dividing the loss involves a crying injustice. It does nothing of the sort: and we should not be the commercial nation we are if it did. Business men do not sit quietly beneath an injustice of the law till such time as chance may remove it. None the less, our system of law ought to be fair in itself, and ought not to require the assistance of purely private methods of obtaining practical justice, such as the habit of insurance; and in considering the question, the rule of law should be examined in itself and apart from any accidental circumstances which prevent the ill effects which would otherwise flow from it. The rule of dividing the loss should stand or fall upon its own merits.

It is important to realize that the nature of the case prevents any actual injustice resulting, whatever the rule of distributing collision damage: for it is just this very fact that makes it possible to adopt a new rule of law upon a question of so far-reaching and momentous a character as one which affects the rights and liabilities of our merchant shipping, without the risk of evil results unforeseen at the time the change is made. In this case the change could, for the above reason, produce no shifting of burdens or other disturbance of the mutual relation of the various sections of the shipping world. Shipowners would not be adversely affected, for their collision risks would continue to be underwritten; underwriters would not be adversely affected, for their collision risks would in the average remain unaltered; whilst, on the one hand, the chance of any particular collision risk becoming payable would no doubt be very slightly increased, the amount payable would on the other hand by the same chance be smaller.

Accordingly, whereas there is the strong reason in favour of the change that the proportional rule would work more justly, so there is no reason against its adoption save the general wisdom of avoiding changes whose benefit is not certain.

But in this case there is a great benefit which is certain. In the present condition of the maritime laws of the civilized world, there is an impediment in the way of commercial prosperity, of which the importance can hardly be over-estimated. The paramount needs of commerce are, in the first place, full knowledge of the conditions under which commercial enterprise may be undertaken; and, in the second place, similarity of conditions over as wide an area as possible. But at present, so far as the maritime laws of the world constitute conditions under which commercial

enterprise is undertaken, the two great needs of commerce are very far from being satisfied. There is between the maritime and commercial laws of civilized nations such diversity that, firstly, it is almost impossible for any man to have any thorough knowledge of the practical effect of any system of law but that of his own country; and, secondly, no system of law extends over what can be regarded from the standpoint of modern commerce as a wide area. Contracts of carriage, mortgage and hypothecation, insurance, liens, collision, limitation of liability, salvage, in all these subjects nation differs from nation; and a shipowner must know a dozen systems of law, each differing from each, before he can ascertain his rights, his remedies, and his liabilities, before he or his underwriter can estimate the risk which ship, cargo, and freight will respectively run on any particular voyage upon which the ship may be bound.

Therefore it is of the highest importance to leave no stone unturned which may help towards unifying this heterogeneous assortment of laws, which are of national authority, but of international effect. By every agreement between nations to adopt the same provisions on any one point of maritime and commercial law, innumerable obstructions to commerce will be removed, and benefits result similar to those which have already resulted in the case of the regulations for prevention of collisions at sea.

The fact is so patent and the present impediment to commerce felt so keenly by all who have practical concern with foreign trade, that no more need be said as to the general need of unification.

But the practical moral remains to be drawn. Monsieur Franck says at the end of his article, 'As a whole, English maritime law is a plain and reasonable law. There is no doubt to me that in the process of unification of maritime law, the English principles will, to a large extent, become universal principles. But still there are some which cannot be maintained because equity and reason condemn them. Amongst these is the rule of division of loss. *As a measure of compromise*, which may lead to unification of maritime law, this principle ought to be changed.' '*As a measure of compromise*', he says, and there strikes the right note. It is exactly as such that the proposal to adopt the proportional rule should be regarded. We British may be saved from the unjust effects of the rule of dividing the loss by our universal habit of insuring, and so far as we are affected we may have no grievance to redress. But international agreements like other agreements are reached by mutual concession by the method of give and take. If we offer to adopt the law of other countries in this respect, they will be the readier to adopt our rule of law in some other respect, where

we do suffer from a grievance, and it is of importance to us that their rule should be assimilated to ours. And this matter of the proportional rule affords us an opportunity of reform, and of concession, where no vested interests can be adversely affected.

It is a first step to a universal law relating to shipping, and it is well to begin with it because it is a simple and easy one. If this step cannot be taken, further steps in the same direction will be impracticable. Monsieur Franck shows that the British objections—made by lawyers rather than commercial men—have given way before the pressure of British mercantile opinion, until at the Brussels conference last year there was no British opposition. And, finally, the great majority of shipowners and underwriters in the United Kingdom are in favour of the change. This, then, is a fitting subject with which to take one small step forwards on the path of unification.

LESLIE F. SCOTT.

LIVERPOOL.

Note.—Monsieur Franck writes (1) That a revision of some points in German maritime law is contemplated by the imperial authorities in Berlin, and that they are willing to include the question of collision damage, if Hamburg and Bremen have any suggestions to make. (2) That a strong body of opinion in favour of the proportional rule is forming in Hamburg and Bremen. (3) That the majority of underwriters are also in favour of the rule. (4) That in the new German Civil Code the proportional rule has been adopted.

At a meeting, held at Salzburg on Sept. 17 last, of the International Association of Insurers of Carriage Risks, at which some sixty-three companies were represented—German, Italian, Austrian, Roumanian, and Scandinavian—a resolution in favour of the proportional rule was carried unanimously.

THE IRISH LAND ACT OF 1896.

THE LAW QUARTERLY REVIEW is not the place to discuss the policy of the latest Irish Land Act, or to dwell on the manner in which it passed through Parliament. But the legislation of which it forms a part, to a certain extent, affects Scotland; many advocate its introduction into Wales. A measure of the same character, it deserves notice, proposed for England, was, a few months ago, rejected even by the present House of Commons, by a comparatively small majority of votes. It may be advisable, therefore, to make a short synopsis of the Act, for the benefit mainly of English readers—I shall carefully abstain from note or comment—especially as it is a part of a Corpus Juris very intricate and difficult to understand, but which, if it is to be intelligible, must be kept in mind, and it is not easy to interpret in itself.

The Act is not an independent measure; it is merely a supplement of the different statutes enacted, of late years, as to the Irish Land. The first of these was the Land Act of 1870 (the 33 & 34 Vict. c. 46), which made Tenant Right, when a custom, law-worthy; engrafted a Tenant Right on the great majority of Irish tenancies, in the form of compensation for what it called Disturbance; and secured compensation to nearly all Irish tenants in respect of improvements they had added to their farms. This statute is, to some extent, out of date, with reference to the assertion of the claims which its provisions create; but it still requires the closest attention, because it is, so to speak, dovetailed into the later statutes, *in pari materia*, upon the subject. The next Act was the celebrated Land Act of 1881 (the 44 & 45 Vict. c. 49), founded on principles different from its forerunner. This introduced, for the first time in our history, the system of fixing 'Fair Rents,' through the intervention of the State; and it conferred on the great body of the Irish tenantry this privilege, and those of 'Fixity of Tenure,' and of 'Free Sale,' the three F's, as they are commonly known in Ireland. This was followed by an Act of 1887 (the 50 & 51 Vict. c. 33), extending the rights given by the Act of 1881 to leaseholders for terms of ninety-nine years or less, with some variations of small importance; and then came the Act passed in 1891 (the 54 & 55 Vict. c. 57), which applied to perpetual, or very long leaseholders, and to fee farm grantees with some exceptions. This last statute entitled tenants of these kinds—the survivors generally of the old

middlemen—either to have the chief rents due to their landlords redeemed, or, subject to some limitations, to obtain the benefit of the three F's. In addition to these Acts, we must also take into account the statutes passed for encouraging what is called Land Purchase in Ireland.

The present Act deals with the land system of Ireland on the side of occupation and of ownership, that is (1) as regards the relations of landlord and tenant—we may describe these briefly as Land Tenure—and (2) as regards the facilities afforded by the State to tenants to become owners of their farms, in other words, what is known as Land Purchase. Taking the subject of Land Tenure, in the first instance, the Irish Land Code has excluded several classes of lands, although in the occupation of tenants, from certain privileges under the Act of 1870, and from the benefits of the three F's, under the subsequent Acts. These lands, speaking generally, are (1) Residential Holdings, that is, lands taken for a residence, or where the residence is the principal subject demised, or where the tenant is not really a farmer; (2) Demesne Lands, i.e. lands appendant to a family mansion, and ordinarily held with it; (3) Town Parks, i.e. lands near a town, held as accommodation lands, at a rent higher than a common farming rent, and held by a townsman resident in the town when the Act of 1881 was passed; (4) Lands 'let to be and used as pasture' and rated at not less than £50; (5) Lands of this character on which the tenant does not reside, or which do not adjoin his farm; (6) Lands demised, under the same tenancy, with incorporeal rights, subjects of the demise, e.g. where a farm is let with a right to tolls, &c.

In a sketch like this, it would be impossible to notice the numerous decisions of the Irish Courts, or the questions as to what lands, in specific cases, are or are not excluded under these provisions. I can refer the English reader to the admirable treatise of Messrs. Cherry and Wakley on the Irish Land Acts.

The present Act has, in some respects, but not largely, modified the law as to these classes of lands. Lands 'substantially' of a residential character remain excluded (section 5). So do demesne lands (*ibid.*) ; indeed the Act excludes demesne lands with peculiar care, and throughout favours the object of keeping demesnes in the ownership of the landlord. But if part of lands held under the same tenancy is non-residential, or is not demesne, these parts, subject to strict limitations, may, at the discretion of the Courts charged to carry the Act into effect, be separated from what is residential or demesne; and tenants of these may be admitted to the benefits of the Land Acts, at least as regards the fixing of a Fair Rent (section 5). As regards Town Parks, lands which are of the

nature of Town Parks, will not be excluded, and may have Fair Rents fixed on them, if they have been let and used as 'ordinary farms' (section 6, and see the 50 & 51 Vict. c. 33, section 9). An important change is made as to lands 'let and used as pasture,' and rated at £50 and upwards; the limit of exclusion is changed to 'upwards of £100'; tenants, therefore, of lands of this kind, whose farms are rated at £100 or less, can obtain the advantages of the Land Acts. Lastly, where land and an incorporeal right are demised, and held under the same tenancy, the land and the incorporeal right may, at the discretion of the Courts, but again under strict limitations, be separated into two subjects, and Fair Rents may be fixed on both.

The Acts establishing the three F's, and enabling Fair Rents to be fixed on land, extend only to 'present' tenants, that is, with a few exceptions, to tenants of tenancies already in existence when the Acts were passed. They do not apply, therefore, to 'future' tenants, that is, to tenants of tenancies beginning after the Acts themselves; such tenants were outside the advantages of the law. These tenants, broadly speaking, were of four classes, (1) tenants holding under contracts made after the Acts referred to; (2) tenants, who, though reinstated in their farms, had been evicted or had received notice of eviction; (3) tenants whose tenancies had been created by limited owners, or by mortgagors and mortgagees, and whose interests ceased with the cesser of the landlord's estate; and (4) under-tenants of middlemen who had been evicted for non-payment of rent at the suit of the superior landlord.

The present Act does not apply to the first two of these classes; these tenants remain 'future' tenants, and Fair Rents cannot be fixed on their farms. But, as regards the last two classes, it provides (section 10), but with some exceptions, and with strong safeguards against fraud and wrong, that tenants whose estates determined with the estate of their landlords may be held to be 'present' tenants; and it makes a similar provision (section 12), but in rather ambiguous language, in the case of the under-tenants of middlemen evicted for non-payment of rent. Tenants of these classes may therefore enjoy the three F's and have Fair Rents fixed, as against the succeeding, or the superior landlord, as the case may be.

'Occupying' tenants are, under the Land Acts, alone entitled to the three F's and to Fair Rents. This is to guard against the subletting and the subdivision of farms, practices very injurious to the Irish Land System. Subletting with the express consent of the landlord, or, after the Act of 1881, with his written consent, leaves the tenant, however, in 'occupation' still; such a tenant

was within the protection of the law. But subletting without, or against, the consent of the landlord, caused the tenant not to be 'occupying' within the statutes; no matter how small the subletting might be, he could not have a Fair Rent fixed, or acquire the status given by the three F's. This strictness was somewhat relaxed by the Act of 1887; it is somewhat further relaxed by the present Land Act. The subletting of a mere outhouse, though a dwelling, and of a small specified portion of a farm may, under certain conditions, be consistent with 'occupation' (section 7), and will not be a bar to a tenant acquiring the privileges conferred by the law.

Subdivision was not such an impediment as subletting; a number of tenants, who had subdivided their lands, might under certain circumstances have a Fair Rent fixed, on the whole land, in the undivided tenancy, provided they all united in the claim, and thus, as a body, could obtain the three F's. But this concurrence, in practice, was all but impossible; subdivided farms were almost always outside the privileges of the law. This difficulty is in some degree removed by the present Act (section 5), but the penalties against 'non-occupation,' caused by subletting and subdivision, remain very serious.

On the whole, various classes of lands, and of tenancies, hitherto excluded, will, by the present Act, be admitted to the advantages of the three F's and of Fair Rents, but, unquestionably, under strict and somewhat intricate conditions.

I pass on to the most important part of the Irish Land Code, the system of fixing Fair Rent on Land, drawing with it, almost always, the three F's. Fair Rents are fixed by the Courts set up by the State for the purpose, that is, by the County Courts and the Sub-Commissions of the Land Commission, subject to a rehearing by the Land Commission, and to an appeal thence to the High Court of Appeal. It has been a subject of much complaint that no definition of Fair Rent has been made by the Irish Land Acts, especially as more than thirty Courts have been engaged in this most arduous duty, and as the late Mr. Law, afterwards an Irish Lord Chancellor, suggested a very just definition of this kind. The present Act leaves the matter as before, and does not attempt to define a Fair Rent; the only principles laid down for this purpose are to be found in the Land Act of 1881, which enacts (section 8) that the Court may determine Fair Rent, 'having regard to the interest of the landlord and tenant respectively, and considering all the circumstances of the case, holding, and district,' and which enacts further (subsection 9 of the section) that 'no rent shall be made payable, in any proceedings under this Act, in respect of

improvements made by the tenant or his predecessors in title, and for which, in the opinion of the Court, the tenant, or his predecessors in title, shall not have been paid or otherwise compensated by the landlord, or his predecessors in title.'

Most economists would say that to fix a Fair Rent on Land by a tribunal of the State would be all but impossible ; the difficulty, it is obvious, has been much increased by the regulations above laid down. Taking the eighth section, in the first instance, it is easy enough to inquire 'into the circumstances of the case, holding, and district,' but it is a most perplexing duty to fix a Fair Rent 'with regard to the interest of the landlord and tenant respectively'; opinions on this subject differing widely. A common view in Ireland is that the tenant's 'interest' is usually about a fourth of the fee; that this is not to be made liable to rent at all ; that, therefore, rent should be charged only on the remaining three-fourths ; and as the Irish tenant, even before the Land Acts, had often concurrent rights in the land, which made him equitably a joint owner—this was seen by Edmund Burke a century ago—this conclusion is not altogether unjust. But, in addition to this, many of the Irish Courts have held that the tenant has also what they term 'an occupation right' in his farm, which should also cause a reduction of rent ; this right may possibly exist in Ulster, but it can hardly exist in the southern provinces ; and, in any case, it is not easy to understand why it should be made, as it has been made, a potent element to work rent down. It is remarkable that it has been found impossible to present this question clearly before the Court of Appeal, and to obtain a solemn decision upon it ; but certainly it has caused large reductions of rent, which many lawyers consider have not been justified.

Turning to subsection 9, we shall see afterwards, that the subject of 'improvements,' as respects Fair Rent, raises questions of the most difficult kind, owing to special causes to be referred to. Assuming, however, that we are now dealing with improvements protected by this subsection, on what principles are these not to be charged with rent, if they have not been satisfied, as required, by the landlord ? Supposing—a process by no means easy owing to the reckless hard swearing on the subject—that the Court has ascertained improvements of this kind, it is usual to allow a liberal percentage for them, to be placed to the account of the tenant, and to be deducted from the natural rent ; this is often a not unreasonable test. But the percentage allowed should obviously be, not on the original cost of the improvement itself, but on its value when the inquiry is made ; and there have been many complaints that this distinction has not been kept sufficiently in mind by the

Courts. Another serious question arises, when, as is very often the case, improvements increase the letting value of a farm, e.g. works of drainage, enclosure and the like—these developing the natural qualities of the land. On the assumption that these qualities are the landlord's property, some of the Courts have held that this increase should enure to his benefit, and that he may be allowed rent on it; others consider that it belongs to the tenant, and that rent is not to be charged in respect of it. The true view, as laid down in a celebrated case, is that this increase is to be apportioned between landlord and tenant, having regard to what their interests in the land are; but this calculation is far from easy; and not a few landlords have declared that the increase has been given to the tenant by the Courts in most instances, and that they have not been allowed additional rent as regards it.

The question, however, what an improvement is, and under what conditions it is to be exempted from rent, is greatly complicated by questions that have arisen on the construction to be placed on the Irish Land Acts. The definitions of the Act of 1870, dealing with 'compensation' only, it must be borne in mind, are incorporated, in this matter, into the Acts dealing with the fixing of Fair Rent; they equally affect the Acts of each class. Now, apart from 'unexhausted tillages and manures,' with respect to which nothing need be said, an improvement, within the Act of 1870, is defined (section 70) as a 'work, which, being executed, adds to the letting value of the holding on which it is executed, and is suitable to such holding'; an improvement therefore must answer this description if it is not to be charged with rent, under the Act of 1881, and of the Acts which are the supplements of it. Upon this view, which is certainly correct, it has been decided that though a tenant had made 'works,' which would be improvements, in a natural sense, still if these were not 'suitable' to the farm, for example, if they were too good for it, these could not be held exempted from rent, that is rent could be charged in respect of them.

Other and graver complications arose also, owing to the interdependence, and close connexion of the Act of 1870, and the Acts fixing Fair Rent. It was long ago established, in a well-known cause, that a claim for exemption from rent, in respect of improvements, was correlative to a claim for compensation made under the Act of 1870; and, consequently, that, in instances where compensation would be denied under this last-named statute, rent might be charged on improvements, notwithstanding the language of the Act of 1881, and the subsequent Acts. The Act of 1870 (section 4) laid down a set of restrictions which barred a claim for

compensation, as respects improvements; for example, among other instances, a claim for compensation could not arise, as regards improvements more than twenty years old, with two exceptions; a claim for compensation might be ousted by the grant of a lease; and the mere enjoyment of an improvement was to be taken into account, in nearly all cases, with reference to a claim of this kind; and, as these restrictions equally applied to claims for exemption from rent, under the Acts for that purpose, it followed that rent, in these circumstances, might be imposed on improvements. And as certain classes of tenants (section 12 and section 22 of the Land Act of 1881) could 'contract themselves out' of a claim for compensation, so they could contract themselves out of a claim for exemption from rent, as respects improvements they had made on their lands.

Deterioration is the opposite of the improvement of land; obviously deterioration, caused by a tenant, ought to be taken into account, as against his improvements, on the occasion of a claim to fix a Fair Rent. This is the more imperative because Irish tenants, as has happened in the case of the Ryots of Bengal, have a direct interest to run out their farms, at the periods when Fair Rents are fixed on these, that is at successive intervals of fifteen years; they hope thus to work their rents down. The law on this important subject was in a very unsatisfactory state; intentional waste committed by a tenant has usually been held to be a set-off to his claims for improvements, and has been taken into consideration in fixing a Fair Rent; but this appears not to have been the practice, in instances of mere permissive waste, the ordinary cause of deterioration, and of everyday occurrence. Irish landlords assert that, in this matter, the grossest injustice has been done; more than one of the judges seem to have concurred.

The present Act makes an important change, as regards the procedure in fixing Fair Rents, and, indirectly, in the system itself, and also as regards claims of tenants as to improvements. It does not, indeed, attempt to describe what is the 'interest' of a landlord and of a tenant in a farm; or whether a 'right of occupation' exists entitling a tenant to a reduction of rent; or in what way any increased 'letting value' arising from improvements is to be apportioned. But (section 1) it requires that the Courts in fixing Fair Rents shall make a very specific schedule setting forth the particulars as to lands which are being subjected to Fair Rents, and also the grounds of their decisions, under distinct heads; this will certainly enable the above questions to be brought before the Court of Appeal more thoroughly than has been possible before. From subsection 9 of this section it appears probable that the

alleged 'right of occupation' cannot be made a factor to cut rent down.

With respect to improvements, the present Act, to a certain extent, breaks down the relation between the Act of 1870 and the Acts that deal with Fair Rents. In many instances a claim for exemption from rent, on account of improvements, will no longer be correlative to a claim for compensation; in these rent is not to be laid on improvements, though a right to compensation would not exist. An improvement, though not 'suitable' to a farm, may be exempted from rent (section 1, subsection 3); though its 'unsuitableness' would bar a claim to compensation. Again, many of the restrictions which prohibit claims to compensation have been removed with respect to claims for exemption from rent; the period of twenty years which limits claims to compensation is extended to forty-six years, as regards exemption from rent, the two exceptions referred to being also preserved (section 1, subsection 7); and the mere grant of a lease, or the mere enjoyment of an improvement (section 1, subsection 8), are not to cause exemption from rent. Rent, in a word, in these instances, is not to be charged, though compensation would be refused; the Act of 1870 no longer applies. The right, in fact, to exemption from rent is, to a large extent, placed on a new basis. Improvements are to be exempted from rent, that is rent is not to be charged on them, unless some 'valuable consideration' shall have been given for them (section 1, subsection 5); this too is to be taken into account by the Courts; and improvements are to be not exempted from rent, that is rent may be imposed on them only 'when they shall have been paid for, or compensated, in pursuance of a contract for valuable consideration' (section 1, subsection 4).

Finally a tenant cannot 'contract himself out' of a claim for exemption from rent in respect of improvements, save to the extent that the Court shall decide that 'valuable consideration' shall have been given when the contract was made (section 1, subsection 6).

These provisions draw a wide distinction, no doubt, between claims for compensation under the Act of 1870, and claims for exemption from rent under the later statutes. Still the correlation between the two classes of claims continues to exist in some instances, if these are not of very great importance. And it must be borne in mind that the Act of 1870 remains unchanged within its own sphere; it regulates claims for compensation as it did before.

As regards Deterioration, it seems probable that the Court must take this into account in fixing Fair Rents; the schedule referred to makes this imperative.

These new provisions have modified, and not slightly, the whole law as to the fixing of Fair Rents; but it is impossible to feel assured what their effects will be; much litigation, I fear, will be the result. In truth when we reflect on the immense difficulty of fixing rent by the intervention of the State, especially under the conditions laid down by the Irish Land Acts, it must be admitted that the land system of Ireland stands on a very unsound foundation.

Some miscellaneous provisions of the present Act, as regards Land Tenure, may be briefly noticed. The 3rd section enacts that a tenant, who has obtained a Fair Rent, shall retain his status, after the expiration of his first term of fifteen years, until his Fair Rent shall have been fixed for a succeeding term; but there never was much doubt on this subject. By the 8th section a Fair Rent may be fixed on tenancies, though the terms of the letting differ, in some respects, from the terms of the documents that express the concession of the three F's; respect being given, however, to the terms of the letting. The 14th section improves the position of very long leaseholders and fee farm grantees, as regards the exemption of improvements from rent; and it extends the benefits of the law to a small class of fee farm grantees, excluded hitherto on narrow technical grounds. The 11th section gets rid of a bad anomaly peculiar to the law of Irish Land Tenure: a middleman who had broken a contract against alienating the land is no longer permitted, as had been the case before, to avail himself of his own wrong, and to defeat the rights he gave his under-tenant; and if the superior landlord lies by, and tacitly sanctions the middleman's act, he may be held to have waived the breach of contract. The 9th section declares that where rights of Turbury, and rights of the kind have been enjoyed by a tenant, with the landlord's permission, the landlord, when a Fair Rent is fixed on the farm, shall be obliged to elect whether he will resume these rights, or consent to have them annexed to the land; the amount of the Fair Rent to be modified as he makes his choice. One of these provisions is of some importance: from various causes heavy arrears of rent have, in many instances, been kept hanging around the necks of distressed tenants; and not to speak of the evil social results, this has operated as a deterrent to applications to the Courts with the view of having Fair Rents fixed. The 16th section enacts that the payment of two years' rent shall practically discharge these arrears; it thus largely mitigates a very grave mischief.

I turn to the part of the present Act relating to what is called Land Purchase. The phrase is a euphemism, and misleading; under

the system in existence for more than ten years, the Irish tenant can acquire the freehold of his farm, without being in a real sense a purchaser ; the State advances the whole purchase-money, this being made repayable by an annuity at four per cent. for a period of only forty-nine years, a render much less than even a Fair Rent. Whether the device shall create a body of thriving peasant owners, or, as some of the best thinkers in Ireland believe, shall tend to produce troubles and end in failure, it is not my purpose to consider here ; I shall only say I have little faith in it. But Land Purchase of this kind is the Unionist policy ; the present Act will encourage it in many ways. It removes most of the checks which had impeded the transfer of estates from their owners to their occupants, through the medium of advances made by the State ; thus (section 28) it dispenses with what is called the 'insurance money' of the purchasing tenant, and (section 29) with the 'guarantee deposit' of the selling landlord, securities which had been taken before. It contains, besides, a whole set of provisions (sections 30, 31) for conveying the land to the purchasing tenant, discharged of superior interests, and other claims, and for transferring these to the purchase moneys in Court, as is the case under the Irish Landed Estates Acts. It does not appear, however, to give a purchasing tenant an indefeasible title to his farm ; and however hardly the Courts may be worked, it is difficult to suppose that they will be able to transfer lands, in any given year, of more value than £1,000,000 or £1,500,000.

The 32nd section of the Act is important and novel, and introduces principles hitherto untried. Not a small part of the land of Ireland consists of hopelessly encumbered estates ; this keeps them in a kind of barren mortmain ; and it is proposed to transfer these to the tenants in occupation, due regard being had to the rights of all the parties concerned. If three-fourths of the tenants agree to purchase, the remaining fourth will be obliged to concur ; this, it has been said, is the thin end of the wedge of 'compulsory purchase' ; but this is rather a far-fetched notion. Compulsory purchase, in this sense, must confer on a tenant a great benefit ; for his purchase annuity will be far less than his rent ; indeed a plan of this kind was proposed as a supplement to the Home Rule Bill of 1886. It can hardly be said that this enactment interferes with the legitimate rights of property.

I need not refer to provisions of the present Act, with respect to the enlargement of the powers of the Congested Districts Board—an excellent institution that has done much good—and to facilitating arrangements between Irish landlords and their evicted tenants. I have abstained, as my purpose was, from comments on

the Act, and on the probable results of its future working; but one or two remarks on the existing position of the Irish Land system may be not out of place. The principle of fixing rents through the agency of the State has not produced the complete chaos described by Mr. Arnold Forster in passionate language; but it has certainly been attended with grave mischief. It has cut down rents more than was deemed possible; it has satisfied neither landlords nor tenants; it has caused demoralization of a very bad kind; it has practically failed, as a general measure of reform. To this hour it has not been applied to more than one half probably of the Irish land; its continuance only holds forth the prospect of perennial litigation and division of classes. It is the fashion to say that it will be remedied by Land Purchase; but this is sheer ignorance, or hardly honest sophistry. Land Purchase cannot be generally carried out; the British taxpayer will not make himself liable for the enormous sum required for the purpose—estimated at £300,000,000 by Mr. Gladstone; the process as it exists must be slow and tentative; and ‘compulsory purchase’ as against the landlord—that is robbing him of his lands against his will—will never be sanctioned by the Imperial Parliament as a measure to be generally extended to all Irish estates. Land Purchase therefore cannot be a panacea for the present ills of the Irish Land system; this will have to be reformed on different principles. British statesmen, it is to be hoped, will be not unequal to the task.

WILLIAM O'CONNOR-MORRIS.

PRIORITIES IN RELATION TO ESTOPPEL.

VARIOUS rules have been enunciated whereby priorities may be determined by reference to the possession of the legal estate, or the deeds. With great respect, the writer submits that they are all defective; that those as to the possession of the legal estate are either too narrow, or misleading, and belong to a system now gone by; and that those as to possession of the deeds induce the idea that their possession is in itself, and apart from the circumstances under which their possession was obtained, or parted with, a test of priority: whereas the truth is, that *conduct with reference to the possession of the deeds* is alone the material consideration, and that that conduct may, or may not, estop him, who would otherwise have priority, from claiming that position.

From the standpoint of estoppel, and in its language (which hitherto, however, has had no place in the discussion of the subject), we would say that, as between competing grantees of an estate, one of them alone, namely the first, can have it; and that if the second is to be preferred it must be, not because the second has the estate (for he has it not), but because for some reason the *first is estopped from setting up his priority*.

This may happen in various ways. The clearest case may be exemplified by one of the earliest authorities¹, in which it was said :

'If a man makes a mortgage, and afterwards mortgages the same estate to another, and the *first mortgagee is in combination to induce the second mortgagee to lend his money*, this fraud will without doubt in equity postpone his own mortgage. So if such mortgagee stands by, and sees another lending money on the same estate, without giving him notice of the first mortgage, this is such a misprision as shall forfeit his priority².'

This case long antedates the modern formulation of the law of estoppel, which is expressed as follows:

'Where one by his words or conduct wilfully causes (induces, per Pollock C.B. in *Bill v. Richards*, 3 Jur. N. S. 522) another to

¹ *Peter v. Russel* (1716), 1 Eq. Cas. Ab. 322; s.c., 2 Vern. 726.

² See also *Ibbotson v. Rhodes* (1706), 2 Vern. 554; *Berisford v. Milward* (1740), 2 Atk. 49; *Stronge v. Hawkes* (1853), 4 D. M. & G. 186; *Hooper v. Gumm* (1866), L. R. 2 Ch. 282.

believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter, a different state of things as existing at the same time¹.

Here it will be seen that the idea of a penalty of forfeiture, imposed for misprision, is superseded by the rational doctrine which imposes nothing but consistency.

For the same reason, if a mortgagee were to deliver up the deeds to the mortgagor, in order to enable the mortgagor to hold himself out as the unencumbered owner, the mortgagee ought to be estopped from setting up his mortgage, as against the person duped by the mortgagor. Observe, that it is not the possession of the legal estate, or possession of the deeds, in these cases, which enables the second mortgagee to claim priority; but the fact that the first mortgagee has, by his conduct, enabled the mortgagor to hold himself out as the unencumbered owner. Giving to the mortgagor possession of the deeds is but one of the ways in which the first mortgagee may assist in deceiving the second mortgagee. It is an example, merely, of one of the rules of estoppel, and is in no way dependent upon any magical influence attaching to title deeds.

'The possession of the deeds does not indeed prove that a person is owner in fee, as a tenant for life has a right to the fee; but it authorizes the inference that there is no prior mortgage, as had there been any, the mortgagor would not have had the deeds' (2 Dav. Con. (4th ed.) 239, 240; Cooke on Mortgages (4th ed.) 925).

And as the mortgagee, by leaving the deeds with the mortgagor, has authorized this inference, he is estopped from denying the fact. That is rational. It is the law of estoppel.

It is the opinion of the present writer, that all questions of priority can be, and ought to be, determined by the principles of the law of estoppel; and it is the somewhat ambitious object of this article to recommend the substitution of those principles for the rules at present in vogue. A distinction no doubt must be made with reference to those rules which pay a greater regard to the legal than to the equitable estate. The writer cannot hope to dethrone these rules; possibly Parliament alone has the power to do so. All that can be done is to show their unreasonableness. The other rules, it is thought, might at once give way to the principles of estoppel; for a review of the cases will show that, although hitherto almost completely unperceived, those principles underlie them all. Let us see then what the current rules are.

RULE I.—*'As between persons having equitable interests, if their*

¹ *Pickard v. Sears* (1837), 6 A. & E. 474.

*equities are in all other respects equal, priority in point of time gives the better equity.*¹ When the word 'equities' is understood, it will be seen that we have the law of estoppel well concealed in this rule. The word simply means the merits or the conduct of the contending parties². The rule, therefore, is, that the first grantee is first, unless his conduct has been less meritorious than that of the second; and the sort of conduct, as we shall amply see, which will postpone the first grantee is that conduct which would naturally induce the second to believe that the grantor was the unencumbered owner of the land. In other words, we have the familiar rule of estoppel that 'Where one, by his words or conduct, induces another to believe the existence of a certain state of things, &c.'

RULE II.—'Where the equities are equal the law will prevail.' Few rules are better known, and thought to be more firmly established, than this one. Nevertheless it is most misleading, because it is much too narrow, and suggests its converse: that if the equities are not equal, the legal estate has no advantage—a statement which is in direct conflict with the authorities.

RULE III.—'Nothing but fraud, or gross and voluntary negligence, will oust the priority of the legal claimant'³. It will at once be seen that this rule includes and goes far beyond the rule last quoted—the rule that where the equities are equal the law will prevail; for by the present rule, although the equities are not equal, yet unless there has been fraud, or gross and wilful negligence, the legal estate wins.

The principal objection to this rule is, that it does not mean what it says. The word 'fraud' is used in a wholly arbitrary sense, and does not mean that there was 'an actual intention to commit a fraud'⁴. We shall return to this subject.

The reason why the second incumbrancer, if legal, will be preferred to a prior incumbrancer, if equitable, is purely historical; and arises out of the fact that originally courts of law took no notice of equitable estates. Sir W. Page Wood thus described the situation⁵:

'The whole doctrine of this court about the protection afforded by means of the legal estate is simply this: A party getting the legal estate acquires no new right in equity in any way. But equity,

¹ *Rice v. Rice* (1853), 2 Dr. p. 78.

² *Ante*, p. 46.

³ *Plumb v. Fluit* (1791), 2 Anstr. 432; 3 R. R. 605; *Evans v. Bicknell* (1801), 6 Ves. 174, 190; 5 R. R. 245; *Martinez v. Cooper* (1826), 2 Russ. 198; 26 R. R. 49; *Farrow v. Rees* (1840), 4 Beav. 18; *Hewitt v. Loosmore* (1851), 9 Ha. 458; *Colyer v. Finch* (1856), 5 H. L. C. 905; *Dixon v. Mucklestone* (1872), L. R. 8 Ch. Ap. 155; *Northern v. Whiff* (1884), 26 Ch. D. 494.

⁴ *Doule v. Saunders* (1864), 2 H. & M. 250, 251.

⁵ *Cooper v. Harrison* (1855), 2 K. & J. 86.

regarding all the persons who have incumbrances according to their priorities, considering that *the equitable interests pass, just as the legal interest does*¹, by the effect of the deeds, finds itself checked at times, and *an obstacle thrown in its way* by an incumbrancer's saying: "I have got the legal estate interposed; I insist it is mine at law, and there must be a superior equity shown in order to deprive me of my legal estate." It is merely staying the hands of the court, by resting on that legal estate which this court will not deal with, unless a superior equity can be shown; and although the court holds that priority will give equity, yet it does not hold that it gives so superior an equity, as between several incumbrancers, as to enable a person, who has an anterior charge, to wrest the legal estate from the person who has obtained it without notice of the anterior charge, and who has not parted with it. This is the whole effect of the doctrine and none other."

From this it seems to be quite clear that had courts of law originally recognized (as did the court of equity) 'that equitable interests pass, just as the legal interest passes,' the doctrine of the priority of the legal estate would never have been established. The course of decision would, undoubtedly, have been that which the court of equity would have followed had it not found itself 'checked at times, and an obstacle thrown in its way, by an incumbrancer saying, "I have got the legal estate interposed; I insist that it is mine at law²."

And it was not without a protest, here and there, that the failure of the law to notice, and enforce, equities, was allowed to continue and breed anomalies. As early as 1787, Ashhurst J. said³:

'It is true that formerly the courts of law did not take notice of an equity or a trust; for trusts are within the original jurisdiction of a court of equity; but of late years it has been found productive of great expense to send the parties to the other side of the Hall; whenever this court has seen that the justice of the case has been

¹ As to this see *Hockley v. Banflock* (1826), 1 Russ. 141, 25 R. R. 16; *Keys v. Williams* (1838), 3 Y. & C. Ex. 55; *Snell's Eq.* (11th ed.) 343; *Pryce v. Bury* (1854), L. R. 16 Eq. 153 (n); *James v. James* (1873), Ib. 153; *Backhouse v. Charlton* (1878), 8 Ch. D. 444; *Lees v. Fisher* (1882), 22 Ch. D. 283.

² The only reason which can be given for depriving an equitable mortgagee of his priority in favour of a subsequent legal mortgagee is that suggested by Eyre C.J. in *Plumb v. Fluit* (1791), 2 Anstr. 432, 3 R. R. 605:—'The person who takes the legal estate without the deeds, in a case like this, appears to me, unless there be fraud, to be less blamable than he who takes the deeds without the estate.' But this blameworthiness of the equitable mortgagee can only be predicated as a neglect of the artificiality of that system which attaches such overwhelming importance to the possession of the legal estate. The equitable mortgagee was not negligent in anything necessary to the acquisition of the estate which he was to receive. All that can be said is that as he knew that the mortgagor could, by using certain words, create a mortgage which would rank prior to his, he ought to have had those words said over his mortgage, and thus transferred the loss occasioned by the fraud to No. 2.

³ *Goodtitle v. Morgan* (1787), 1 T. R. at p. 762.

clearly with the plaintiff they have not turned him round upon this objection. Then if this court will take notice of a trust, *why should they not take notice of an equity?*¹

The doctrine, too, that the legal estate drags priority to it, apart from the circumstances, or equities of the case, has led to this singular, and absurdly anomalous, result: that it resembles the greasy pig, which being, in general scramble, seized by one (equitable incumbrancer) gains for his captor the prize, provided that he has seized it fairly and has not too soon let it slip.

*Roper v. Harrison*² gives us a good view of this sort of sport. The first mortgagee had the legal estate, and a power of sale, with the usual declaration of trust as to surplus moneys. He devised the estates to the third mortgagee, who, now having the pig, became entitled to priority over the second mortgagee. Foolishly, or in ignorance of the rules of the game, he sold the estates under the power in the first mortgage. The second mortgagee then contended that, the pig having been let slip, the contest was now over the money, and not over the estate: if it were over the estate of course No. 3 was prior, for he had had the legal estate. Sir W. Page Wood said:

'Harrison (the third mortgagee) might have advanced the money (to pay off the first mortgagee) out of his own pocket, and have held the whole legal estate for the two debts. . . . Or he might have raised the money by transfer of the mortgage, and have procured the person who took the legal estate to execute a declaration that he would hold it on trust to secure himself his mortgage debt, and secondly to secure that of Harrison; and had he taken this course Harrison would now be the person having the best right to call for it. . . . It is said that this would render it a mere matter of machinery; but that in truth is the result of the whole doctrine of this court about the legal estate, and a very singular machinery it sometimes is. It is merely a question of how far a person, who has dexterously managed to lay hold of this *tabula in naufragio*³ is allowed to seize it. Even after bill filed by a second incumbrancer he is allowed to seize it, but it is on that he rests. It would seem to militate very much against the views which this court entertains of not allowing rights to be disturbed by third persons; and there was some hesitation and doubt, as to allowing a person holding the legal estate to hand it over to the one, or the other, as he thinks fit. All that is a very peculiar part of this doctrine; but the court has never gone beyond this; and if it does not find the legal estate interposed, it deals with the money according to priorities.'

¹ 1855, 2 K. & J. 86.

² Freely translated in this connexion—pig.

³ See also *Goodwin v. Roberts* (1876), 1 App. Ca. 476; *Pilcher v. Rawlins* (1872), L. R. 7 Ch. 259; *Sheffield v. London* (1888), 13 App. Ca. 333; *Simmons v. London Joint Stock*

A case which well illustrates the absurd respect paid to the legal estate is that of *Cave v. Cave*¹. Trust property was, in fraud of the beneficiaries, mortgaged by the trustee to several innocent persons in succession. The first of these, of course, alone had the legal estate. His mortgage was good against the beneficiaries. The others had the equitable estate only. Their mortgages were bad as against the beneficiaries². Why should the law not be the same in both cases? In both the trustee did the same wrong. In both the beneficiary had to bear the same (if any) blame, namely, that he had a fraudulent trustee. In both cases the purchaser was innocent, paid his money, and completed his transaction. But in the one case, the courts decide for him, and in the other against him. And if the man with the pig chose to hand it over to the third, fourth, or fifth incumbrancer, the court would declare in favour of the one so selected—favoured by a man who should have no power of bestowing priorities.

The rules which govern the scramble for the legal estate; under what circumstances it is fair to seize it³; at what time it may be seized⁴; what persons may, or may not, help you to seize it⁵; whether or not you must give value for it; to what extent it must be complete when you get it⁶; and what persons have the best right to seize it⁷; do not interest us here. They may in all their subtle refinement be found in the cases just referred to as well as in countless others.

It is with reference to difficulties and anomalies such as we have been considering that the language of Lord Selborne in *Dixon v. Mucklestone*⁸ is peculiarly applicable:

'It is impossible to reflect on this injustice, without finding very cogent arguments in favour of some attempt to improve the state of the law, as to title to real estate, and to get rid of the difficulty which arises from the distinction between a legal and an equitable estate.'

¹ *Bank* (1891), 1 Ch. 270; (1892), A. C. 201; *Bentinck v. London* (1893), 2 Ch. 120; *Powell v. London* (1893), 1 Ch. 610, 2 Ch. 555; *Bailey v. Barnes* (1894), 1 Ch. 25.

² 1880, 15 Ch. D. 639.

³ And see *Re Morgan* (1881), 18 Ch. D. 93.

⁴ *Saunders v. Deheu* (1692), 12 Vern. 271; *Willoughby v. Willoughby* (1787), 1 T. R. 763; *Allan v. Knight* (1846), 5 H. & C. 272; *Baillie v. McEwan* (1865), 35 Beav. 177; *Dodds v. Hill* (1865), 2 H. & M. 424; *Taylor v. Russell* (1891), 1 Ch. 8; (1892), 2 A. C. 244; *Pease v. Jackson* (1868), L. R. 3 Ch. Ap. 576.

⁵ *Dodds v. Hill* (1865), 2 H. & M. 424; *Baillie v. McEwan* (1865), 35 Beav. 177; *Queen v. Shropshire* (1873), L. R. 8 Q. B. 420; *Harpham v. Shacklock* (1880), 19 Ch. D. 207; *Blackwood v. London* (1874), L. R. 5 P. C. 92; *Mumford v. Stokemasser* (1874), L. R. 18 Eq. 556.

⁶ *Sharples v. Adams* (1863), 32 Beav. 213; *Mumford v. Stokemasser* (1874), L. R. 18 Eq. 556; *Maxfield v. Burton* (1873), L. R. 17 Eq. 15; *Garnham v. Skipper* (1885), 55 L. J. Ch. D. 203.

⁷ *Rodd v. Williamson* (1888), 38 Ch. D. 485; *Powell v. London* (1893), 2 Ch. 555.

⁸ *Moore v. North-Western* (1891), 2 Ch. 599; *Newman v. Newman* (1885), 28 Ch. D. 674.

⁹ 1872, L. R. 8 Ch. 158.

In 1874 Parliament recognized the unreason of the rules we are dealing with and passed the statute 37 & 38 Vict. c. 78, s. 7, by which it was enacted as follows:

'After the commencement of this Act, no priority or protection shall be given or allowed to any estate, right or interest in land by reason of such estate, right or interest being protected by, or tacked to any legal or other estate or interest in such land; and full effect shall be given in every court to this provision, although the person claiming such priority or protection as aforesaid shall claim as a purchaser for valuable consideration and without notice.'

The Act was short-lived. It was repealed in the following year by 38 & 39 Vict. c. 87, s. 129.

In the Provinces of Ontario and Manitoba a fraction of the anomaly—that part which permitted the tacking of a third mortgage to the first—was abolished many years ago. The present statutes are Rev. St. Ont. 1887, c. 114, s. 83; Rev. St. Man. 1892, c. 135, s. 72. The rest of the anomaly is in these Provinces still full of life.

And such unreason, it is admitted, must for the present continue. Parliament alone, probably, can bring relief¹. For the following rules, however, it is hoped, more can be done.

RULE IV.—'It is an established rule in a court of equity, that a second mortgagee, who has the title deeds, without notice of any prior incumbrancer, shall be preferred; because if a mortgagee lends money upon mortgage without taking the title deeds, he enables the mortgagor to commit a fraud'².

This rule it will be seen is wide enough to cover contests between grantees of legal estates. It is based upon the possession of the deeds merely, and treats as immaterial the 'quantity of pains, or diligence which' the first mortgagee 'exercised to obtain them'³; but in 1801⁴ Lord Eldon declared it to be 'founded upon error'; and laid it down that the mere fact that the first mortgagee had parted with the deeds, was not a sufficient ground to postpone him,

'unless there is fraud or concealment, or some such purpose, or some concurrence in such purpose; or that gross negligence that amounts to evidence of a fraudulent intention.'

The 'fraud,' 'concealment,' 'concurrence,' here spoken of refer to the deceit practised by the first mortgagee upon the second mortgagee. If the first mortgagee has been guilty of that, the

¹ See, however, the suggestions as to the application to the subject of the principles of Estoppel in the continuation of this article in the ensuing number of this REVIEW.

² *Goodlill v. Morgan* (1787), 1 T. R. at p. 762.

³ *Plumb v. Fluit* (1791), 2 Anstr. 440, 3 R. R. 610.

⁴ *Evans v. Bicknell* (1801), 6 Ves. 190, 5 R. R. 245.

second has priority. But why? Not that, by it, the second actually obtained the estate, for he did not. Not that, by it, the second mortgagee obtained the deeds, for even if he did not obtain them, and yet was misled by the conduct of the first mortgagee, he will obtain priority. No, the reason is that by reason of the conduct of the first mortgagee (enabling the mortgagor to hold himself out as the unencumbered owner), he is estopped from setting up his estate as against the person who was misled by such conduct. In other words and in the language of estoppel:

'Where one by his words, or conduct, wilfully induces another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter, a different state of things as existing at the same time¹.'

This is, however, almost persistently overlooked, and possession of the deeds, apart from conduct with reference to them, is over and over again appealed to, as a reason for awarding priority.

RULE V.—For example, there is the rule laid down by Malins V.C.²: '*I have not a shadow of doubt, that where there is merely an equitable mortgage, unaccompanied by the legal estate, in every case where the equitable mortgagee either omits to get, or having got, gives up, possession of the deeds, he must always be postponed. . . . I decide this case on the general principle, that one equitable mortgagee, without possession of the deeds, must be postponed to another who has that possession.*'

This rule was dissented from by Gifford V.C. in *Thorpe v. Holdsmith*³; but was reasserted by Malins V.C. in *Hunter v. Walter*⁴; was cited by Hall V.C. in *Spencer v. Clark*⁵; and was considered to be too clear for proof by Pearson J. in *Lloyd v. Jones*⁶. To the present writer, with much respect, it is indubitable that the rule is not only wrong upon authority⁷, but that it is essentially erroneous in fixing attention upon the mere locality of the deeds, instead of upon the conduct of the parties which placed them, or enable them to be placed, there; that is to say, instead of applying to each case the principles of the law of estoppel.

We shall presently see that there are many cases in which, under reasonable excuse, the first mortgagee either never got the deeds, or,

¹ *Pickard v. Sears* (1837), 6 A. & E. 474; *Bill v. Richards* (1857), 3 Jur. N. S. 522.

² *Layard v. Maud* (1867), L. R. 4 Eq. 397, 406. ³ 1868, L. R. 7 Eq. 139.

⁴ 1871, L. R. 11 Eq. p. 316. ⁵ 1878, 9 Ch. D. 142. ⁶ 1885, 29 Ch. D. 229.

⁷ *Hewitt v. Loosmore* (1851), 9 H. & C. 458; *Colyer v. Finch* (1856), 5 H. L. C. 905; *Hunt v. Elmes* (1860), 2 D. F. & J. 578; *Dixon v. Mucklesome* (1872), L. R. 8 Ch. 155; *Allen v. Knight* (1846), 5 H. & C. 272; *Roberts v. Croft* (1857), 2 De G. & J. 1; *Davie v. Saunders* (1864), 2 H. & M. 242; *Re Morgan* (1881), 18 Ch. D. 94; *Re Vernon* (1887), 32 Ch. D. 165, 33 Ib. 402; *Re Richards* (1890), 45 Ch. D. 589.

having had them, parted with them for a temporary purpose, and yet retained his priority. The question is always one of the reasonableness of the conduct of the parties, and involves the rule of estoppel recently quoted. The subject will be more fully dealt with and the cases cited later on.

RULE VI.—‘*As between two persons whose equitable interests are of precisely the same nature and quality, and in that respect equal, the possession of the deeds gives the better equity.*’

This is perhaps the best known, and best formulated, rule upon the subject. It is in the language of Kindersley V.C.¹, and differs from that of Malins V.C. in postulating that the equitable interests shall be ‘precisely the same nature and quality.’ By construction, this language might be taken to mean that in addition to the fact that both estates were equitable, that both of them were of identical character, for example, that they were both held by mortgagees. But that was not the meaning of the learned judge, for the case he had in hand was one between an unpaid vendor claiming a lien for purchase money, and an equitable mortgagee, with whom the deeds have been deposited by the purchaser. These equitable estates the learned judge held were ‘of precisely the same nature and quality,’ and he gave priority to the mortgagee, because having the deeds he had the better equity.

This interpretation of the language of the rule, however, leaves it open to contradiction by a very important line of cases, viz. those in which a trustee, having the deeds, deposits them with persons who have no notice of the trust, to secure a loan to himself; in which cases the beneficiaries are given priority over the mortgagee, although he has the deeds².

THE TRUE RULE.—If the rule of Kindersley V.C. is defective, much of the judgment in which it is found is, nevertheless, of the greatest value; and although stated by way of exception to, or modification of the rule there laid down, it is, as the writer thinks, the best exposition anywhere to be found of the true rule upon the subject. The Vice-Chancellor’s rule is quoted everywhere, the extracts from the judgment given below are almost never met with. The learned judge said:

‘I must however guard against the supposition that I mean to express an opinion that the possession of title deeds will, in all cases, and under all circumstances, give the better equity. The deeds may be in the possession of a party in such a manner, and under such circumstances, as that such possession will confer no advantage whatever.’

¹ *Rice v. Rice* (1853), 2 Dr. 73.

² *Care v. Care* (1880), 15 Ch. D. 639; *Re Margin* (1881), 18 Ch. D. 94; *Lewin on Trusts*, 9th ed., pp. 808, 809.

'In examining into the relative merits (or equities) of two parties having adverse equitable interests, the points to which the court must direct its attention are obviously these: the nature and condition of their respective equitable interest, *the circumstances and manner of their acquisition, and the whole conduct of each party with respect thereto*. And in examining into these points, it must apply the *test, not of any technical rule, or any rule of partial application, but the same broad principles of right and justice which a court of equity applies universally in deciding upon contested rights.*'

'Indeed it appears to me that in all cases of contest between persons having equitable interests, *the conduct of the parties and all the circumstances must be taken into consideration, in order to determine which has the better equity.*'

And after stating that the text-writers mislead,

'When an opinion is expressed that the one or the other has the better equity;'

he adds:

'If I am right in my view of the matter, neither the one nor the other has necessarily, and under all circumstances, the better equity. Their equitable interests, abstractedly considered, are of equal value in respect of their nature and quality; but whether their equities are in other respects equal, or whether the one or the other has acquired the better equity, *must depend upon all the circumstances of each particular case, and especially the conduct of the respective parties.* And among the *circumstances which may give to the one the better equity, the possession of the title deeds is a very material one.*'

The only sentence in these extracts, which, from the stand-point of estoppel, calls for serious modification, is the last, in which it is said that the possession of the deeds may be a circumstance, 'which may give to the one the better equity.' With much deference to so able a judge, the writer would suggest that the possession of the deeds is not a circumstance which, by itself, can help to determine the question; but that, at furthest, possession of the deeds is only suggestive of conduct, by which they reached the possession in which they are found, and which therefore may put the other person to *explanation of such conduct*, at the peril of estoppel in case he fail¹.

The Vice-Chancellor not only in this last sentence (as is submitted) attaches erroneous importance to the mere locality of the deeds, but (as has been judicially pointed out) overlooked other circumstances in the case which would have rendered it entirely unnecessary to base his judgment upon that possession. The

¹ See *Allen v. Knight* (1846), 5 H. & C. 271.

facts were that a vendor executed a conveyance to the purchaser, signed a receipt upon it for the purchase money, and handed over the deeds, although the purchase money had not been paid. The purchaser having subsequently deposited the deeds by way of equitable mortgage, the vendor claimed that both his estate and that of the mortgagee were equitable and of equal value; that his was first in point of time; and that, therefore, he was entitled to priority. Now if, as the learned judge held, 'the conduct of the parties and all the circumstances must be taken into consideration, in order to determine which has the better equity,' estoppel would have no difficulty in holding that the vendor, although first in point of time, had, by signing the receipt and handing over the deeds, estopped himself from setting up his priority. The learned judge, however, refers in no way to the principles of estoppel, but is led away from it by the current phraseology about the possession of the deeds; and after referring to the rule (as above quoted) holds thus:

'Applying this rule to the present case, it appears to me that the equitable interests of the two parties being in their nature and quality of equitable worth, the defendant *having possession of the deeds, has the better equity.*'

That the vendor's conduct in handing over the deeds, and thus enabling the purchaser to hold himself out as the unencumbered owner of the estate, and not merely the possession of the deeds, is the important point, will be at once apparent when we consider that if the purchaser had stolen the deeds, or obtained them by subterfuge, their possession by him would not have transferred priority from the vendor to the mortgagee.

Although as has been said the cases upon the subject of priorities never refer to the law of estoppel, yet in many instances the language of the judges sufficiently indicates that the principles which were actuating them were those which belong to the law of estoppel. The language of Kindersley V.C. quoted above is an excellent example of this. In *Thorpe v. Holdsworth*¹ Gifford V.C. said:

'The mere possession of the title deeds by a second mortgagee, though a purchaser for value without notice, will not give him priority. There must be some act or default on the part of the first mortgagees to have this effect.'

Again, in *National Provincial Bank of England v. Jackson*², Cotton L.J. said:

'As between equitable claims the question is whether one party

¹ 1868, L.R. 7 Eq. 139.

² 1886, 33 Ch. D. 1; approved in *Farrant v. Yorkshire* (1888), 40 Ch. D. 189.

has acted in such a way as to justify him in insisting on his equity as against the other.'

The only criticism that these remarks seem to be open to, is that they ought not to be confined to equitable estates; for with reference to legal estates as well as equitable, the question must always be whether the first owner 'has acted in such a way as to justify him in insisting on his "estate" as against the other.'

The same may be said of the language of Wright J. in *Powell v. London & Provincial Bank* (93, 1 Ch. 615):

'In particular cases, however, he may on special grounds be entitled to priority over some previous equitable incumbrancer, as for example *in cases of laches on the part of that incumbrancer*.'

He may be entitled, as we shall abundantly see, to priority over a legal incumbrancer also.

Mr. Snell¹ states the law in this way:

'For although the first in time retains in general his priority, still if he have also the legal estate; yet *he may lose his priority, and that either by fraud or by negligence*.'

And again²:

'As between equitable incumbrancers, relief will be given to the incumbrancer prior in point of date, unless he has lost his priority by his own act or neglect.'

Lewin on Trusts³ has the following:

'The possession of the title deeds is a circumstance which may give the holder a better equity, provided they have come into his possession from want of due activity on the part of the prior incumbrancer, or through some neglect or default of such incumbrancer.'

But the learned author overlooked the fact that if there be the 'neglect or default' which he refers to, the subsequent incumbrancer will obtain priority even without possession of the deeds⁴; and that it is therefore more correct to say that such conduct, rather than that possession of the deeds, may give the better equity.

In *Northern Counties Fire Ins. Co. v. Whipp*⁵ the law is thus stated:

'That the court will postpone the prior legal estate to a subsequent equitable estate, where the owner has assisted in, or connived at, the fraud which has led to the creation of a subsequent

¹ Snell's *Equity*, 11th ed., p. 329.
² *Clarke v. Palmer* (1882), 21 Ch. D. 124.

³ *Ibid.* ⁵ 9th ed., p. 807.
⁴ 1884, 26 Ch. D. 482, 494.

equitable estate; of which assistance or connivance the omission to use ordinary care in inquiry after or keeping title deeds, may be, and in some cases has been, held to be sufficient evidence where such conduct cannot otherwise be explained. . . . But that the court will not postpone the prior legal estate to the subsequent equitable estate, on the ground of any mere carelessness or want of prudence on the part of the legal owner¹.

And if we ask, Upon what scientific ground will the court in such cases decree postponement of the incumbrancer who has the estate? there can be no answer but that supplied by the law of estoppel:

'Where one, by his words or actions, wilfully induces another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter, a different state of things as existing at the same time².'

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(*To be continued.*)

¹ See also the language in *Powell v. London & Provincial Bank*, '93, 1 Ch. 615.

² *Pickard v. Sears* (1837), 6 A. & E. 474; *Bill v. Richards* (1857), 3 Jur. N. S. 522.

INSTINCTIVE CRIMINALITY AND SOCIAL CONDITIONS.

AMONG the great fallacies which have taken a lasting hold of both tutored and untutored minds, and as the groundwork of systems of philosophy startled the world, is the idea of a golden age. Long before Rousseau wrote of a social contract, long before Zeno taught the individual duty of resistance to passion, the intellectual fathers of the past dwelt fondly on an age in which man, freed from all earthiness, lived pure and peaceful. That period, whose ruling spirit was loving co-operation, has been discussed from time immemorial. It has proved of immense service to the speculative scientist, and subserved the purpose of the labour leader. Philosophers, whose philosophy is evident in superabundant untenable theories, have joined the cynic in denouncing society, its modes and progress. It matters little to them that one believes in the fact of an evolution from good to evil, the other in a change from bad to worse. Both regard the past as a standard from which the world has departed only to deteriorate.

Professors of religion lament, have always lamented, and must necessarily always lament, the decadence of peoples. Even the old time squire, with a soul centred in port and fox-hunting, babbles about the 'good old times,' and bemoans the disrespectful temper of degenerate sons of men. And yet for two centuries, at least, the wise have taught the lessons of history. And to some extent in vain : for the 'golden age' is a pleasing formula ; it is full of agreeable associations, and appeals to the artistic temperament with the force of an undraped statue or a flaring yellow flower.

And, further, the idea is a powerful antiseptic to the stern reality of a world where railways abound and athletics are approved. As a plaything it may be tolerable, but as a basis of practical conduct it is absurd. I do not intend to deal with those who countenance the idea and its appropriate appurtenances, further than to deny categorically that there ever was such an age as 'the golden age.'

That is sufficient for my purpose.

And now to briefly inquire into the conditions of early mankind. A fitting resort to the historical method of inquiry has proved conclusively that the state of primitive man was one of internecine disputes, imprudent selfishness, and deified violence.

Going far beyond the period at which—to quote Sir Henry Maine's pet phrase—the 'family was the unit of society,' and

even previous to the establishment of an exogamous regulation, right back to the time when man, four-footed, hairy, and donkey-eared, had his being in the cave, and lived on what he could find in the ground or the spoils of his encounter with another beast, we see man as he was in his primitive condition, before he lived in association with his fellow men. It may not be a pleasant looking backward, but it is inevitable.

History laughs at the idea of a golden age, and enjoins the student of sociology to date as the first stage of society the time when man was many steps lower in the progressive scale than the hairy ainu, the intellectual inferior of the educated ape of the itinerant organ-grinder.

From an age of filth, and not from an age of gold, it is historically necessary to trace the career of man. The principal stages in that career can be shortly summarized as follows: Primaeva man lived in a state of pure individualism. He was a law unto himself and the women and weaklings whom in his sensual wanderings he met. His morality was measured by his creative wants and the strength of his foe. His habits were those of the beast amongst whom he lived and with whom he fought. He killed and ate, chattered and quarrelled, ravished and slept. He lived for himself, a creature repulsive in appearance and abominable in habit. Then, at some period which it is impossible to exactly define, he began to associate with his fellow man. This fact of association is the evidence of his first progressive step, the commencement of the reign of civilization.

Directly man consorted with man, he necessarily became in a degree social, and the cultivation of self was considerably affected by his altered position. For the convenience of the associates—settled or nomadic—rough rules were laid down as to the division of the chase or of war, these rules being greatly increased when the nomadic was superseded by the stationary mode of life. At this period the age of morality had begun, and the inception of law was foreshadowed.

The primary rules which had served the wandering hunters would not suffice for permanent co-dwellers, and thus in the process of time they were refined, expanded, and materially added to in point of number. Each particular rule infringed somewhat the licence of the associates, this being a necessary consequence of that subjection of the individual desire to the paramount interests of the associated, which association implied.

The imposition of restraint on the individual for the benefit of the many marks the era of liberty, which had now become an accomplished fact. In all the changes and alterations in the rules

rendered necessary by ever-changing circumstances, the principle of change and modification of existing licence and individualism was the necessities of men living together in a state of peace. It was the adoption, conscious or unconscious, of this principle which from an aggregate of fortuitously collected individuals caused the development of society, each member of which is compelled to regard the convenience of his co-members and harmonize his conduct with the requirements of others. To say that individuals were thus actuated is to say that they had attained some measure of civilization. For civilization, in its fullest meaning, is but a succinct method of expressing the result of the adoption as a principle of conduct, both individual and national, of the permanent good of a community. The nations which have consciously adopted this principle as a basis of action most consistently and most thoroughly are those who are now the rulers of the world.

It would be outstepping the proper limits of such an article as this aims to be to analyze the various causes which have contributed to the practical development of this principle, but it will not be out of place to say that, whatever from a cosmic and theological standpoint may be the shortcomings of Christianity, the religion which taught that man lives not for himself alone had much to do with the evolution from a system of gross imperfect selfishness of a municipal creed whose fundamental doctrine is a prudent self-regard.

And now, having dealt with man, his primitive notions and methods, my foregoing statements may be adequately summed up as follows: Man, considered as a member of a community, is naturally imprudently selfish, is naturally lawless, and consequently is naturally anti-social. Or, to put it in another way: Man, until he is taught what regulations he has to obey, is necessarily unable *knowingly* to obey or offend against those regulations. And this will serve to make it clear that I am not on the side of those who labour to prove that the criminal is merely an abnormal person, or one who is *morally* insane. On the contrary, I consider—putting the truly insane out of the question—that the criminal *is* normal; that criminality is the result of causes external to the criminal himself and totally unconnected with the influences of heredity. In my opinion it is as absurd to say that the criminal is born *not* made, as it is to ascribe criminality to the possessor of certain physical attributes.

Now, I have already stated that man is naturally anti-social. At his birth, he is either capable of *appreciating* the teaching of the state or not. If his mind is so singularly weak as to render him either absolutely unintelligent or (perhaps) destitute of self-control, or if he is unable to distinguish between right and

wrong or cannot appreciate the nature and quality of a certain act, he is called 'idiot' or 'lunatic.' Between this condition of mental unsoundness and sanity there can reasonably be no intermediate condition, whether it be called moral insanity or by any other high-sounding title.

But, for all that, let us shortly in the light of the preceding analysis look into this question. It is claimed that there is such a thing as an instinctive criminal, a person who is born into this world the unfortunate possessor of an innate peculiar and abnormal disposition to break the laws of the country he happens to reside in. Now, bearing in mind that a crime is simply a particular infringement of the law obtaining in a community, the sanction of which is enforced by the sovereign power in that community, and further that laws are constantly changing, and the character of crimes consequently frequently varying, it surely seems unreasonable to argue that a babe may be a victim to a desire to infringe the Factory Acts or evade the postal regulations of his country.

Is it reasonable to argue that a child may be born with a disposition to break a law which has received the royal assent at the very moment of his birth? Assuredly no. Yet those who advocate an innate criminality theory are forced to do this or admit the untenability of their views. They may, however, object that what is meant by innate criminality is an abnormal disposition to override all laws and not the tendency to commit a specific offence. Well, to that it may be replied, that as the greater includes the less, the child cursed with such a disposition is innately constrained to carry offwards in chancery, refuse to give stamped receipts for money paid, and negligently allow his chimney to take fire.

And again, it may be pointed out that 'torts'—or actionable wrongs independent of contract—are in every case intimately connected with, and in some cases inextricably mixed up with, crimes—differing from crimes only in point of procedure.

Still, in order to consistency, the advocates of the 'innate tendency' theory must aver the existence in the criminal not of merely natural anti-social tendencies but of an innate abnormal disposition to be guilty of all torts, including those of libel and nuisance.

According to my view (I think it better to sum up my foregoing remarks before discussing the views of a leader of the opposite school of thought), every person is naturally anti-social, in that he will naturally prefer himself to all others; but that any particular person will, *when he ascertains* the state and subject-matter of the regulations affecting him and the people amongst whom he lives, be actuated by innate more or less irresistible forces derived from

his own peculiar mental or physical character to disregard those regulations seems to me to be opposed to the teachings of science and reason. Further, I contend that man is the creature of circumstances, and is dependent on heredity only for those qualities which may be described as physical.

Mr. Havelock Ellis, whose work 'The Criminal' reflects the views of the Lombroso school, is of a different opinion. To him the criminal is an 'abnormal man,' a 'monstrosity,' 'a person who is by his organization directly anti-social.' It is difficult to see how any one can be naturally social, but that is a question for later consideration. Mr. Ellis also lays down that 'to be criminal a deed must be exceptional in the species, and must provoke a social reaction among the other members of that species.' He also divides criminals into the following classes: political, occasional, habitual (created by social conditions—at least, I presume that is what he means), and instinctive. This last is the class worthy consideration, for other criminals are but petty bunglers in comparison with those who are born to commit every available kind of crime.

That every criminal (meaning thereby the instinctive criminal) is born a criminal is the keynote of Mr. Havelock Ellis's highly ingenious work, taken together with the fact that every criminal can be distinguished at once by the competent eye. One waits with some curiosity to see what the marks of distinction are: the more important are as follows:

Receding forehead; lack of cranial symmetry; sugar-loaf head; and, it seems also, a low skull. In the cerebral department, inasmuch as Gambetta's brain 'resembled in shape that of a microcephalic idiot,' it is not altogether surprising to note that neither the convolution, shape, nor development of the brain are at present valuable as indicia to the criminal anthropologist.

In the face: prominent chins denote great, and receding chins petty, criminals.

Other criminal facial marks are—prominent cheek bones; wrinkles; pallor of skin; rectilinear nose; abundant hair; scanty beard; dark eyes; and in sexual offenders light eyes.

While it may surprise many of those who practise in criminal courts to learn that 'a pleasing, well-formed face is never seen in a prison,' the fact that the eminent physiognomist Lavater once mistook Herder's portrait for that of an executed criminal will reassure those who feel nervous as to the portentous aspect of their own countenances and 'hirsute appendages.'

In the body: the distinctive marks are—long arms; pigeon breasts; bad chests; stooping shoulders; and among other indicia denotative of the criminal are—great physical agility; bad

olfactory sense ; ill developed sense of taste ; good eyesight ; bad hearing.

Moral insensibility, we are also told, is an important index to the criminal, though one might be pardoned for thinking that early training was not altogether unconnected with its cause. Physical insensibility is another index ; vanity is another,—and this perhaps accounts for the ever increasing number of female criminals. Immaturity in the parent, or decadence of the father often produces the criminal ; fathers over forty-one years of age being especially likely to beget idiots and murderers. The criminal is further to be recognized by his tastes and occupation ; he is fond of alcohol, cards and sexual vices ; he dislikes regular work, and is sentimental, religious or superstitious ; he is given to write poetry on the walls of his cell or on the kitchen utensils ; he is both stupid and cunning ; he is frequently tattooed, and generally justifies his misdeeds on high moral principle. And, finally, the typical criminal would have 'projecting ears, thick hair, and thin beard, projecting frontal eminences, enormous jaws, a square and projecting chin, large cheek bones, and frequent gesticulation,' and would in type resemble the Mongolian or sometimes the Negroid.

The above being the indicia which denote the criminal, if the *fact* that the human face and body varies very slightly in the inhabitants of defined regions does not prove the absurdity of the theory, a week passed at the Old Bailey or in a Cardiff or Liverpool Assize Court would effectually demonstrate the shakiness of Mr. Havelock Ellis's generalizations.

But on this score it is not my part to quarrel with that gentleman, for having anticipatorily dealt with the theory of innate disposition, I am only concerned with the theory that underlies his writings, namely that of an hereditarily acquired criminal disposition. Mr. Havelock Ellis may object that his views do not necessarily demand an adherence to the doctrines of heredity, and although I do not for a moment suppose he would put forward such an objection, it will be as well to anticipate it. He labours to show that criminals are born not made, and that they bear on them the physical marks which denote a criminal mental tendency. This then establishes an identity as between body and mind, or if not an identity, at least a close relationship. Now, it must be conceded by the greatest stickler for 'circumstances,' that physical construction does largely depend on the influences of heredity, and so, if a certain physical construction is eventually co-existent with a certain mental tendency, it must follow that heredity necessarily plays an important part as an element in Mr. Havelock Ellis's theory. And assuming that it does, I have

dealt already with the doctrine of innate tendency, and now I will briefly consider it again in relation to heredity.

Briefly, the points at issue are: Can a human being come into the world endowed with a disposition anti-social in the sense that he has a tendency to break the laws of his country, and not *anti-social* in the sense that he will do his best for himself according to his lights? Mr. Havelock Ellis says, Yes; and I in the preceding pages of this article have said, No. (2) Assuming there is such a disposition, can it be communicated by parent to child? On the second point, let us look at it from a practical standpoint. Would any competent breeder of the lower animals breed to obtain mental results?

In short, to quote concrete cases, is it likely that a sane breeder would breed from a performing pig or a calculating horse, in order to obtain increased qualities of intelligence in their progeny? Having regard to the history of mankind, the researches of biologists, and the various processes of consciousness, it is hard to say in what essential respect the animal world differs from mankind.

But, coming directly to the case of man, no educated person would expect a brilliant child to result from the union of a senior wrangler and the foremost mathematician at Girton.

It is, we believe, not asserted by any competent person that intellectual qualities can be transmitted from ancestor to descendant, and it passes understanding why a criminal disposition should be included among heritable qualities. It would take up too much space to enter minutely into an analytical disquisition on the subject, but I assume that it is capable of proof that the only heritable qualities are those dependent on physical characteristics. This, at least, is the conclusion to which I have been led by a study of available data. I admit that such capacities as are indicated by musical skill, oratorical power and others of an essentially similar kind are heritable, for they are intimately related to physical conformation, but I can see no sufficient reason to justify the inclusion among heritable qualities of those capacities which are properly styled intellectual.

Take an ordinary child, and put him in a bassinette with another child of the same age, e.g. six months, who is the possessor of a toy. How long will it be before the envious ordinary child attempts to commit robbery with violence, disturbs the public peace by brawling, and is engaged in the highly anti-social act of losing its temper. Again, when at home, what is there dearer to that ordinary child, in the intervals of feeding, than hurting a kitten or killing a fly, unless it be the doing malicious injury to

property in breaking its bottle. This child is a type, and he is *ex hypothesi* the child of ordinary parents and the representative of a very ordinary ancestry. Is it then to be assumed that the child is a *born* criminal? True, he acts criminally, and will continue to act criminally, until he is taught by a rigorous system of punishments and rewards to realize how impossibly anti-social he is.

Mr. Havelock Ellis and his school might say that notwithstanding all teaching the born criminal continues his vile career. To that it may be replied that experience does not warrant the supposition in the case of any human being, and Mr. Ellis himself in advocating ameliorative measures destined to reform *the* criminal is attacking his own theory with inconsistent reasons. The truth is that both of Mr. Havelock Ellis's theories are fallacious: they are pretty, but they lack a sensible basis.

And now finally to state the conclusions of the opposite school. Every one, being instinctively anti-social and naturally individualist, endeavours to obtain for himself the maximum of good, regardless of others' rights and others' convenience. If *having been taught* how to mould his conduct so as to accord with the views of the community of which he is a member, he continues to transgress the regulations, he either does so intentionally or unintentionally. If the latter, he is not responsible for his actions, and is insane. If, not knowing what rules are laid down by the community, he offends, he is clearly not criminal in mind,—though criminal in fact, according to some unscientific systems of law. In short, criminality, or the disposition to commit a crime or crimes wilfully and intentionally, is the result of a conflict of desires. Criminality implies comparison, and therefore cannot be unconscious or innate. The causes of the existence of a permanent tendency to crime in man are lack of education, miserable surroundings—implying poverty, and in England and some other countries, the prevailing penal system; and the habitual criminal, who in this classification takes the place of Mr. Havelock Ellis's instinctive criminal, is the victim of circumstances. He is the victim of circumstances in that the causes above specified render the desire to break the law greater and more operative than the desire to avoid punishment and gain the rewards which honesty is supposed to bring in its train.

Education, the improvement of the social conditions of life, and an improved penal system will alone reform *the* criminal.

It is the habitual criminal who can be dealt with and reformed; it is the occasional criminal, the slave of passion, who is the standing pest of civilization. The forces of education and worldly wisdom are powerless to prevent the crime of the paederast and the poisoner,

and society will ever stand mute periodically at the commission of some brutal crime, the work of educated men whose motive is revenge or lust.

But the habitual criminal, about whom books are written and treatises composed, is curable. He is driven to crime by circumstances which are not unchangeable; he is the slave of a vicious social system which is not ineradicable.

The report of the Departmental Committee on prisons bears out my contention. In 1893, whose judicial statistics are given in the report, the total number of persons convicted at Assizes and Quarter Sessions was 9,694, of whom 5,335, or 55 per cent, had been previously convicted. Of this number again 2,988 had been previously convicted on indictment, and 2,347 on summary process. In the different classes of offences given below, the proportion of recommitments varies as follows:

Offences against the person	30 per cent.
Offences against property with violence . . .	66 "
Offences against property without violence . .	64 "
Malicious injury to property	42 "
Forgery and coining	32 "
Other offences	25 "

and the Committee remarks: 'The proportion is highest where the offence offers to the habitual criminal the best means of obtaining a livelihood. This is further illustrated by the fact that for the offence of larceny from the person there were 79 per cent. of recommitments, and for simple larceny 78 per cent.' 'The majority of recommitments are in respect to larceny'; and this invites the suggestion that as instinctive criminality can hardly be claimed as a privilege of the poor, the rich, whom larceny as a means of earning a livelihood would not excite, are singularly fortunate in the division of criminal dispositions. I have not sufficient space at my disposal to suggest how best to deal with criminals. But one thing is certain, and that is that every increase in our population, unless it is accompanied by prudential measures for the improvement of the masses of the people, means an increase in the number of recidivists. Mr. Havelock Ellis, and those who think with him, wear out their energy in discussing how such luxurious agencies as Turkish baths and gymnastic training may be used to convert the instinctive criminal. Would it not be better to give up putting the so-called instinctive criminal on the rack as a pretty problem, and, looking facts squarely in the face, advance to the relief of those whom poverty and misery will inevitably lead to crime. Though day by day, in accordance with prevailing sentiment, new Acts of Parliament are made and new offences consequently con-

stituted, it is gratifying to note that the proportion of criminals to the population is ever being lessened. This in itself is a significant fact, and it speaks volumes in favour of the beneficial influence of education, and the action of a progressive community.

Prevention is better than cure. A useful Act of Parliament couched in a democratic spirit is worth a myriad of such remedial forces as prison visitors and Turkish baths. Educate; educate; educate; should be the everlasting cry of the legislator: the improvement of the social condition of the mass of the people should be the aim of the statesman. It is idle to preach the doctrines of religion to a man whose life outside the prison walls is a hell: 'If I do not steal,' the habitual thief may ask, 'what am I to do? My record is known, the police are ever anxious to distinguish themselves; my past life is a barrier to a honest livelihood.' He may commit suicide, it is true, but if he tries to kill himself and fails, he will get maybe six months' hard labour for attempting to deprive the state of a potential soldier. It is in the case of such a man that the difficulty arises, and it must be grappled with. To treat the victim of circumstances as a romantic plaything is both cowardly and intolerable.

The instinctive criminal is but the habitual criminal—which term must include those who, having made up their minds to a career of crime, are prevented, e.g. by death or altered conditions of life, from continuing in their criminal course beyond the first crime—after all, the man whose original fall was, in the large majority of cases, caused by either social misfortunes, or lack of education, or both causes acting in combination, and whose after career was guarded by the demons of police supervision and ticket-of-leave.

But, although it may be comparatively easy—dismissing as untenable the theory of innate criminality—to spy out the means of dealing effectually with the 'criminal class,' and although the philanthropist may confidently anticipate the time when that class of poverty-stricken wretches whose ignorance is on a par with their miserable surroundings, shall be so depleted as to be almost non-existent, it is presently impossible to cope with the criminals who are actuated by motives of revenge or lust. These criminals are generally occasional, but inasmuch as some of them—especially sexual offenders—are permanently involved in the commission of crimes, they should be termed *habitual criminals*, were it not for the fact that that term customarily denotes gain as the object of the crime. The paid catamite would thus be included among habitual criminals, but not so the paederast, the motive of whose crime was lust. Mr. Havelock Ellis might include him among instinctive criminals, but hardly, for it is clear that such a criminal is either

the victim of too much or too little education. Besides, the crime of unlawful connexion with men or beasts is of a curious origin and character, and would not support his theory.

Without entering into further detail, I think I may assume this. The criminals whose fault is born of revenge are distinctly occasional. These criminals who commit the foulest crimes are not touched on by writers on criminality. They are so ridiculously normal as it were, and all preventive and remedial human agencies seem to have failed in their case. What is then to be done? Here, indeed, is a fine field for the scientist. The occasional and not the habitual criminal opens up a huge mass of possibilities to the prospective philosopher. The output of habitual criminals, not including the sexually vicious, can be materially lessened, I firmly believe, by the efforts of the wise. It remains to be seen whether the most severe punishment or any other human agency can alter the course of those who have committed sexual offences, or prevent the commission of crimes by men acting suddenly and in obedience to an overwhelming passion, since every human being is a potential criminal by passion.

ERNEST BOWEN ROWLANDS.

THE CODE OF PROPERTY OF MONTENEGRO.

I. INTRODUCTORY.

BEFORE the war of 1877 between Russia and Turkey, Montenegro was enclosed within narrow limits, and surrounded by high mountains, and had scarcely any towns, communications, or commerce. But after the Treaty of Berlin its territory was doubled, and its independence formally recognized by all the European Powers. The country is now a principality with an area of 9,433 square kilometers, and a population of 300,000 souls. The addition of neighbouring cantons, which had belonged to Herzegovina and Albania, has given it more fertile lands, some towns, and also two ports on the Adriatic. The inhabitants of the added cantons were not all of Slav race; some were Albanians, and henceforward, side by side with the orthodox population, are found Catholics and even Mohammedans. Moreover, as regards the land, there were now large domains, constituted under the Ottoman domination, and not merely the small holdings of ancient Montenegro. Thus the preparation of a civil code was as difficult as it was necessary.

Montenegro was untouched by the traditions of Roman law, which had been preserved by practice in the Latin countries and Germany, and by the teaching of the Universities in England, Russia, and the Scandinavian countries. It had lawyers versed in points of custom and local usage, but no juridical literature or jurists of wide scientific education. The nearest Slav universities, those of Zagreb in Croatia, and Belgrade in Servia, were of recent creation, and up till 1880 numbered hardly a single Montenegrin among their students. Fortunately for Montenegro, the Russian Government was able to supply a man well fitted to draw up a code, namely, M. Bogišić, Professor of Law in the University of Odessa, a native of Dalmatia, where the same language is spoken as in Montenegro. He had studied law in the schools of Vienna, Munich, Berlin, and Paris, and had spent several years in travelling about the countries inhabited by the Southern Slavs in order to make a study of their customs¹. He commenced his work in 1873, and finished it in 1882. The code was not finally

¹ The result of these researches has been published in the Serbo-Croatian language under the title of 'Collectio consuetudinum juris inter Slavos meridionales etiamnum vigentium.' Zagreb, 1874. See Maine, Early Law and Custom, pp. 241 seqq.

passed into law till March 25, 1888, and came into force on July 1 of the same year.

The code is called '*General Code of Property*', because it contains the rules concerning the daily transactions of which property can be the object, and affects Montenegrins in general: as opposed to *special codes*, which deal with different kinds of property, as the Code of Commerce, the Maritime Code, &c.

II. METHOD, ARRANGEMENT, AND CHARACTERISTICS OF THE CODE.

The author has himself explained¹ the methods which he has followed in framing the code. The code has for its basis the customs of the country, but is amply supplemented by new principles and provisions borrowed from the most recent developments of modern juridical thought. Firstly, these two elements had to be reconciled or fused: then, it was necessary to use a language intelligible to all without destroying the literary and scientific character, which would enable Montenegro to enter into relations with its neighbours, and to keep up with them a certain community of ideas and principles; finally, it was desirable to avoid such rigidity and finality as might arrest the natural development of national customs.

By a tradition, which goes back to the Roman law, almost all codes, ancient and modern, have a dual character. They are at once works of legislation and of instruction: they not merely lay down rules, they wish also to define and explain them. In the Montenegrin Code that which is properly the law is absolutely separated from what belongs to the domain of theory. One generally commences by laying down principles, and then proceeding to deduce results. But it is one of the most original characteristics of the new code that it first lays down particular rules, and then proceeds to generalize and go back to principles. In fact, it proceeds by induction rather than deduction.

In the above observations may be found an explanation and justification of the peculiarities of the new code, the most important of which consists in the exclusion of the law concerning the family and succession. One expects to find these treated in a civil code, but what is possible in the rest of Europe is not so in Montenegro, nor among the other Slavs of the South, with whom succession is a result of the system of undivided communities. The rules which regulate these organizations of rural

¹ Bogićević, *Quelques mots sur les principes et la méthode suivis dans la codification du droit civil au Monténégro*. Paris, 1886; 2nd edition, 1888.

families have not been sufficiently studied and ascertained, and it would be useless and even dangerous to give a final expression to institutions which are undergoing changes, and thereby crystallize and stereotype what should be allowed the fullest liberty of growth or possibly decay.

The Code of Montenegro, then, is, as its title indicates, a Code of Property. It only deals with the family and succession in their relation to property. The absolute separation of the two groups of subjects has its advantages, and the French in their colonies have followed the example of the British in India, in leaving intact the personal law of the native inhabitants.

As has been remarked above, the law and theory are separated. In the first five parts of the code the law merely commands without explanation or definition, while the sixth part is confined to definitions and explanations, and indeed constitutes a didactic treatise. This arrangement is not without precedent, for the Pandects of Justinian terminate with two titles, *De verborum significacione* and *De Regulis Juris*, and not a few English and American statutes follow this example. The last chapter of the code consists of some fifty proverbs or 'juridical maxims, which, without being able to modify or change the law, can throw light on its spirit and sense.' These serve, in a country like Montenegro, to popularize the idea of justice. In the sixth part the author, in order to be better understood, often addresses himself to the reader, and engages with him in a sort of familiar conversation.

Besides provisions peculiar to Montenegro, such as those concerning pre-emption, the family community, partnerships for ploughing and tillage, the different forms of leasing cattle, antichresis, &c., we find in the code, under a somewhat new form and in a new order, certain well-known matters, borrowed from the Roman law, elaborated by the jurists of different periods, and forming to-day as it were the common patrimony of all European nations. Such are the provisions concerning hypothec, certain conventional servitudes, the transfer of property by means of certain formalities, possession, usucaption, prescription, minority, and others. There would appear to be nothing new to say in these matters, and new legislation can but cull and select the best types of older laws. Still, even in these matters, the author of the code has introduced slight modifications with a view to bring them into harmony with the customs of the country and the contracts peculiar to it. Although the code is comprehensive so far as it goes, it abstains from building up one of those vast systems, too prone to generalization, which German science delights in. It has employed the most natural method, classifying subjects

according to their affinities, and proceeding always as far as possible from the simple to the complex, from the concrete to the abstract.

The code gives to custom a larger importance than it enjoys in the legislation of other European countries. In the absence of a law, custom is to be applied. When it is clear that a particular case has not been foreseen by the legislator, the law must not be tortured into saying what it never contemplated; the judge is to apply custom, if any, and in the absence of any custom he is to decide according to analogy and equity, and such analogy is *not confined to the analogy of other laws, but may be drawn also from other customs.*

The code consists of 1031 articles in six parts, as follows:

1. General Provisions.
2. Property and other Real Rights.
3. Sale and other principal kinds of Contracts.
4. Contracts in general and other sources of Obligations.
5. Man and other subjects of rights, capacity, and in general of the right of will.
6. Explanations, Definitions, and Supplementary Provisions.

III. SOME PROVISIONS OF THE CODE.

Part 1. General.

When a person has a thing in his power, with the will of possessing it, the law protects him in such possession against all attacks, on the sole condition that such possession has not been acquired by violence. An action is open to any person who claims that another's possession is in bad faith or illegal, and that he has a preferable right to such possession; but it is absolutely forbidden to disturb or arbitrarily dispossess the possessor (art. 18). Possessory actions must be brought within three months from the disturbance or dispossession.

Part 2. Property and other Real Rights.

Property in Montenegro is not transferred by the simple act of the parties. Every contract transferring immovable property must be in writing, and must be confirmed by the Court (26). But judicial confirmation is not necessary when the transfer takes place by succession, partition of joint family property, judicial decision, or other order of any authority. In India every person succeeding to immovable property as a proprietor, whether by purchase, gift, or inheritance, is bound to apply within six months¹

¹ See Bengal Land Registration Act, VII of 1876.

for entry of his name in the Land Mutation Registers kept by the collector of the district in which the property is situate. In Montenegro it is only the possessor in good faith who is allowed the benefit of prescription or usucaption, the term of which, in the case of immovable property, is fifteen or thirty years uninterrupted possession, according as he can or cannot produce a just title. For movables the term is reduced to five or fifteen years.

A person may sell his immovable property to whom he pleases, subject to the right of pre-emption, which, according to the ancient custom of the country, belongs to the members of the clan (*brastvo*), to the relatives, to the members of the village, and to those of the tribe (*pleme*). If intimation has been given to those interested, they must take action within a week; otherwise, within a month from the date on which the contract has been confirmed by the Court. In the village communities of the Panjab and Upper India, rights of pre-emption are not uncommon; but in Lower Bengal much harm has been and is being done by the non-existence or disappearance of any such custom. Co-sharers not only sell to strangers—perhaps to a rival zemindar or to some grasping Marwari money-lender—their *undivided* shares of the common lands, but even of ancestral family residences, to the harassment of the co-owners and the oppression of the cultivators. Until partition is effected, the new purchaser has a right to collect his quota of rent for every plot of land, and to cultivate himself the *khas* or *kamnt*¹ lands to the extent of his share. Art. 61 of the Montenegrin Code enacts that when a stranger to the tribe or the village acquires any immovable property therein, he can only share in the enjoyment of pasturage, water, wood, and other common rights provided that the vendor has sold *the whole* of his share, and has left the village or tribe, and that the purchaser settles down definitely in his place, and takes upon himself his share of the public charges, which his vendor had hitherto borne (such as village police, tithes, construction of roads, &c.). The minute fractional division of shares is the curse of India, and the revenue work occasioned thereby bids fair to swamp the collectorate establishments, if the Legislature does not come to the rescue². A man with a one-pie

¹ Otherwise known as *sir*, *nijote*, or *zirat*; that is, the lands in the immediate occupation of the proprietors in which there are no *ryotti* or tenant-rights.

² There is now a Bill before the Bengal Legislative Council which aims at preventing minute partition, by enacting that the collector shall not separate any share, unless the land revenue for which it shall be liable (when separated) exceeds so many rupees. Every estate added to the Revenue Roll means considerable additional work for the office of the collector. A separate account is kept for each estate, even though the revenue payable be only a few annas, with the instalments in which it is payable; and separate ledgers are kept of the different cesses payable in respect of each estate—the Road Cess, Public Works Cess, and Zemindari Dak Cess. Then

share may sell so many *ghudas*, or even smaller fractions, to a number of different purchasers! This is sometimes done intentionally with the object of ruining or harassing the other co-sharers. The rule in the Montenegrin Code, that a co-parcener can only sell the *whole* of his share, appears to be well suited to the circumstances of Bengal. The excellence of the principle is recognized as far as the tenants are concerned, the Bengal Tenancy Act containing a provision that the zemindar is not bound to recognize or give effect to the transfer of *part* of a *ryotti* or occupancy holding.

No foreigner can become the owner of land in Montenegro except by virtue of a gift from the prince (64). But apart from this purely political restriction, foreigners enjoy the same civil rights as Montenegrins.

The provisions regarding co-ownership, rights, and obligations resulting from *vicinage*, real servitudes, usufruct, building on another's land, mixing or incorporation of different substances belonging to different persons, accession, occupation, and finding of treasure are in the main the same as those of the Roman and French law. But as regards the right of irrigation, there are some peculiar provisions, exclusively borrowed from local custom. In India the common law is not easy to ascertain, and differs in different localities. Customs are difficult to prove, and the Civil Courts, in the absence of a statute, fall back on English text-books¹. Disputes about the right to irrigate frequently lead to cases in the criminal courts. This is due to the absence of a civil code and the consequent want of certainty². There are often disputes as to how far the water of a certain tank, stream, or water-course can be taken for the purpose of irrigation. Art. 124 of the Montenegrin Code lays down a rule which is at any rate capable of ascertainment. The nearest field gets the water until it is covered (or has been once irrigated), and then the next nearest, and so on, field after field, until the first field irrigated has become dry. The owner of such field is then entitled to stop the flow of the water, and irrigate his field a second time, and so on in the same order. Even with such a rule it is probable there must be disputes sometimes as to whether

mutations have to be made in the Land Mutation Registers whenever any change of proprietorship takes place.

¹ There is an Indian Easements Act, V of 1882. But it has not been extended to Bengal. Munsifs, however, refer to the Act, and to works such as those of Gale and Goddard.

² What is wanted in India is certainty. Sir Henry Maine said: 'Let us have uniformity, if we can have it; diversity, if we must have it; but always certainty.' In temporarily settled districts, settlement officers draw up elaborate records of rights, and incorporate all such matters in the settlement proceedings. But in permanently-settled Bengal, the Civil Courts have to grope their way to ascertain custom, and there is perhaps no court where it is so difficult to prove a custom as that of a Bengal Munsif.

the first field *has become dry or not*. Then there are often disputes leading to rioting in India when a *pyne* (water channel), coming from a source in village *A*, passes for some distance through the lands of village *B*, and then again into village *A*. Can the villagers of *B* use such water at all, and if so to what extent? Can they divert the water from the *pyne*, and if so, for how many hours in each day? Art. 130 of the Montenegrin Code enacts that, when a spring rises in a certain village, only the inhabitants of such village have a right to use it for irrigation. Other villages, no matter how near they may be, have no right, unless they have exercised it from time immemorial, or have acquired it by agreement or other legal means. The inhabitants of the same village are entitled to use the water, even when its source is on the land of a private person, and not on the common village land. If, however, the private owner finds the servitude too burdensome, he can require the village, or that portion of the village which uses the water, to buy his entire estate (121).

Fish belong to him who has caught them, *unless at the time or place in question fishing was prohibited* (75). This appears to be a good rule. There are many private fisheries in Bengal from which it is theft to take fish, though it is not larceny at English common law, because the water is not enclosed, and the fish have a means of escape. The Calcutta High Court upset convictions for theft and criminal trespass, and this caused serious administrative difficulty, because there are many fisheries in rivers, *jheels*, &c., which were settled with zemindars at the time of the permanent settlement, and pay an annual revenue to Government, just as any landed estate. Moreover, many zemindars had been exercising private rights of fishery in streams included in the ambit of their estates, and in large inland pieces of water or lakes, from which, under the Calcutta ruling, there could be no theft, as such waters are almost always connected (always in the rainy season) with some river. To meet the difficulty the Bengal Legislative Council passed the Private Fisheries Act, I. B. C. of 1889. The Act, however, has been a failure, as, owing to faulty drafting or otherwise, the Courts succeeded in driving a coach and four through it. A similar Act for the whole of British India is now under the consideration of the Supreme Legislative Council.

If a swarm of bees escape, and the owner fails to pursue them for forty-eight hours, or if, having pursued them, he loses sight of them for twenty-four hours, they are considered to be ownerless (77).

A man who finds treasure on his own land becomes the owner of it; if he finds it honestly and without fraud on the land of

another he gets half, the other half going to the owner of the land (79).

If the branches of one man's tree extend over the land of another, the latter may require the former to lop them off; and, on his failure to do so, may go to the Court for an order. But an exception is made in the case of olive trees, the branches of which may not be cut, unless there be a local usage to the contrary (111). In India the Courts generally hold that the neighbour may himself lop off the branches; certainly, if the owner of the tree complains before the magistrate of 'mischief,' his complaint is summarily thrown out. If the neighbour suffers the branches to remain, he may collect the fruits; but again olive trees are made an exception (112).

There is a clear rule as to trees planted on the boundary of two estates (113). If the roots of a tree penetrate to the land of another, the owner of the land may only cut them off if the land is cultivated, and the cultivation is harmed thereby (114). When a man's land or house is separated from the public way by the lands of others, so that access to such way is cut off, or only possible by means of a wide circuit, the former may claim a right of way over the intervening lands; but for this right he must pay in a lump once for all such a sum as may be fixed by experts (116). A wall between two houses is presumed to be common to both, and either owner may use the wall up to half its thickness, by laying beams on it, &c., provided the wall be not shaken or damaged (139). Such simple and definite rules are much required in India¹.

Part 3. Sale and other principal kinds of Contracts (222-493).

As regards the sale of horses and cattle, Art. 242 enacts that the Minister of Justice, in consultation with the Council of State, shall, whenever he deems necessary, make special rules on the subject of responsibility regarding defects and vices. In such a matter the Courts are no doubt glad to have for their guidance rules which are based on the knowledge of experts. In England the case law could only be controlled by a new Act passed by the Legislature.

Two special contracts are worthy of mention. The *supona* is a sort of association for pasturage, with the object of sharing the

¹ The writer knows of a case, in the last district he served in, in which a dispute about a boundary wall between two houses caused the expenditure of several thousand rupees in litigation, and all for the want of a little bit of substantive law. First, there were two or three criminal cases, the usual outpost skirmishing, and then came the regular suit or battle in the Civil Court. The country is overdosed with elaborate adjective or procedure law, but what is wanted is a simple civil code—certainly at any price.

manure¹. Each member engages to send to the pasture-grounds a certain number of cattle with a herdsman, and to supply the quantity of salt they require. Only the dung is shared, the milk and other products belonging to the owner of the animal (442). The *sprega* is a partnership by which several persons agree to use one another's oxen for the purpose of ploughing their lands in a certain order. If one man contributes more oxen than another, they work proportionately for a longer time on his land. If an animal dies while the work is going on, the association suffers the loss, and not the individual owner (446-456). It is otherwise in India.

If interest is not fixed, it is presumed to be eight per cent. per annum, but it can never exceed ten per cent. Compound interest is rigorously forbidden (262, 263). In India the former usury laws were repealed by Act II of 1855. There is a rule of Hindu law that the interest must not exceed the principal, but the Courts have not acted on it. A native member of the India Legislative Council has recently introduced a Bill, the object of which is to enable the Courts to regulate the rate of interest, and to rip up unconscionable bargains more than they can do or choose to do at present².

A cultivating lessee cannot change the nature of the cultivation or holding without the consent of the lessor. For instance, he cannot convert vineyard into arable land, or arable land into meadow (298). The same rule is contained in the Bengal Tenancy Act. Cultivators are often willing to dig tanks on their land *pro bono publico*, but cannot do so, owing to the exorbitant *salami* (premium or fee) demanded by the zemindar as a condition of giving his consent.

The chapter dealing with contracts of service and work contains some provisions which, though they savour of minute interference to our ideas, may possibly be useful in a more primitive community. For instance, a servant, living in his master's house, who falls ill while working for the house without any fault on his part, cannot be dismissed for that fact only, but must be cared for like any other member of the household. If the illness lasts more than a month, and the parties cannot agree as to what is to happen for the future, the Court decides according to the circumstances of

¹ In India the cowdung is used as fuel, and also for *leeping* (smearing) the court-yards and walls of houses to keep them pure and clean. A little is kept burning at night to keep off the mosquitoes. The writer knows of no partnership like *supora* in India. But partnerships like the *sprega* of Montenegro are very common. Each house has its own manure heap, and the droppings on the pasture lands or elsewhere are collected by poor old women, who sell as fuel.

² [The old equitable jurisdiction to relieve against unconscionable bargains with persons in an inferior position has been applied with some effect, especially by the High Court of the N.W.P. See cases collected at p. 77 of my Tagore Law Lectures on the Law of Fraud, &c. in British India, Calcutta 1894.—ED.]

each case (335). If a workman's work is interrupted by rain or any other obstacle, for which neither party is responsible, for more than a quarter of the day, the master can deduct a proportionate part of the day's pay; but where food is given by custom to the workman, it must be given just as if there had been no loss of time (340).

Hotel-keepers are liable for articles lost by travellers, even when the latter have not specially entrusted them for safe keeping (391); but an exception is made in the case of money, jewellery, and precious articles, for which the hotel-keeper is only liable if he has taken the custody of them.

Gambling and betting debts can only be recovered in Court, if the money has been deposited with a third person or with the Court, and then only if the debt is not contrary to probity or good morals. The law, however, allows play and wagers, 'the object of which is to strengthen the body and mind': as horse-races, foot-races, wrestling, sword exercise, chess, &c., and debts resulting therefrom can be recovered in Court. But the Court may dismiss the claim or reduce it when it finds the stake has been *excessive* and therefore immoral (475-478).

Every gift above 500 francs must be made in writing and confirmed by the Court; also annual payments exceeding forty francs a year. The gift can be revoked on the ground of ingratitude, but the action for revocation must be brought within ten years. The gift may be annulled if it has been made in fraud of creditors.

Part 4. *Contracts in general and other sources of Obligations* (494-635).

There is little or nothing of a special or peculiar character to notice under this head, the general principles being almost the same in all legislation.

The limitation for actions for damages by reason of a delict or quasi-delict is one year. The periods of limitation are long, but there is a special reason for this, apart from the fact that the length of prescription is always in an inverse ratio to social and economic progress. The principle of limitation was only introduced into Montenegro by Prince Danilo between 1851 and 1860. A Montenegrin proverb says: 'Even after 100 years I can get back from you what you owe me.' Hence a compromise between ancient custom and the short periods of modern legislation.

Art. 600 is worthy of quotation: 'What a person has received to do an illegal act can be recovered, whether the act has been accomplished or not, subject to the condition that there has been no immorality on the part of him who has given, but only on the

part of him who has received. If there has been immorality on both sides, the thing given cannot be recovered, but the receiver must give it to the poor-box.'

Part 5. Man and other subjects of rights, capacity, and in general of the right of will (636-766).

The age of majority is twenty-one; but a minor, who has completed his eighteenth year, and who shows himself capable of managing his affairs, can be declared a major, and such declaration confers on him all the rights of majority (638). So also the minor who has married.

There are definite rules as to when an absent person is to be presumed to be dead. When twenty years have elapsed from the receipt of the last news showing him to be alive, it is presumed that there is no longer hope of his being alive. If the person was a minor when the last news was received, the period of twenty years is counted from the date of his attaining majority. If, on the other hand, he had attained his sixty-fifth year at such time, the presumption is made after a lapse of five years. In the case of persons disappearing in a war, or being on a ship which has foundered or been wrecked, the presumption is made if no certain news of his being alive is received within three years of such disappearance (679, 680). When the presumption has been made by law, the husband or wife of the absent person may of course marry again without any fear. In England a person who marries again under such circumstances could never be absolutely certain of immunity from a criminal prosecution.

After natural persons, the code treats of moral or juridical persons. The most interesting is the family community, preserved to this day among the Serbo-Croatians under the name of *zadruga*. The code only deals with the family from the point of view of property. To bring it into harmony with the needs of modern society, individual responsibility has been substituted to a great extent for the ancient collective responsibility. The patrimony of the community consists first of the property acquired from previous generations, and secondly of the product of the labour of each member. On the other hand, what a member of the community acquires by succession or gift becomes his *peculium* or own property, of which he can freely dispose. A decree against a member of the community is first executed against his own peculiar property (if any), and then against his share of the common property. For this purpose the community is directed to set apart his share; and if it fails to do so within two months, it takes the responsibility of the debt.

After the family community, the code enumerates other moral persons, the tribe (*pleme*), the clan (*brastvo*), churches and convents, and lastly the State.

Then there are associations and foundations on which personality is conferred by the Council of State, if satisfied that their object is not opposed to law or public morals, nor prejudicial to public order, to public credit, or general prosperity (724). Before according sanction, the Council of State may demand the modification of the rules of the association, or the addition of other rules.

Part 6. *Explanations, Definitions, and Supplementary Provisions.*

Although the above heading contains the word 'definitions,' yet the code avoids definitions as much as possible, and seeks to replace them by descriptive explanations. Most codes, and especially the German Codes, *commence* by laying down general or abstract rules. The Montenegrin Code proceeds on the inverse plan; it first lays down the law, and relegates to the end of the code the theories and explanatory definitions, which are intended to further elucidate what has gone before.

'Custom' is defined as every rule which is observed in the national life and in judicial practice, and which is not incorporated in any written law (779).

By 'rules of good morals' are intended those rules of good faith and honesty, the observance of which cannot be always compelled by authority, but the violation of which is always condemned by public sentiment (785).

'Possession' is defined with great perspicuity, and the different kinds of possession are carefully distinguished. Possession is said to be 'in good faith' when the possessor has the firm conviction and, according to the circumstances, has good reasons for thinking that he is the legitimate possessor (816).

The law considers as 'arbitrary' all possession acquired by violence, or clandestinely, or taken or kept by fraudulent means; and such possession is not protected. Possession is 'regular' if it has a lawful basis, as sale, gift, or succession; otherwise it is 'irregular.' But 'irregular' possession may be in good faith if the possessor thinks it is regular. The possessor in good faith, against whom a decree for restoration is passed, is only bound to restore the proceeds of the property from the date on which he knew of the action brought against him (823).

Art. 843 is aimed against aliens and interlopers. It states that there is 'no vacant and ownerless land in Montenegro,' as when it

does not belong to an individual or family community, it must belong to a clan, a tribe, a church, &c. No one can become the owner of a piece of land by simply clearing or enclosing it (843). Such a rule does not appear to be conducive to the development and best interests of a country.

The right or easement of passing on foot over the land of another does not include the right of taking cattle. But where there is a right of taking cattle, it includes the right of passage on foot, on a horse, or in a carriage (856). The right of pasturage does not give any right to bring on the land cattle of which one is not the owner, or has purchased for purposes of trade. In the absence of special agreement, pigs and goats are not included in a right of pasturage; nor, in the absence of agreement, does a right of pasturage give any right to cut the grass. In India rights of grazing extend only to the bovine species. Pigs are an abomination in India to all except one or two very low castes. Goats and sheep are taken about the country by one or two shepherd castes for purposes of sale. They are not usually kept in villages.

An agreement to do what is impossible is null and void; and everything is considered to be impossible which cannot be done without wounding probity and good morals. It is no longer considered immoral to receive a sum of money as a consideration for not denouncing an offence, if the payment can be regarded as compensation for the material or moral injury caused by the act (915).

'Earnest money' is given as a token of the completion of the contract, and, at the same time, the better to secure its fulfilment. The 'penalty' is what one of the parties agrees to pay in case he may wish to withdraw from the contract, in order that such withdrawal may have a legal value. The 'penal clause' is the fine or other punishment which the defaulter agrees to incur in case of non-execution or inadequate execution of the contract (934-936).

Art. 944 contains a useful didactic rule regarding the limits of private defence: 'The limits of lawful defence are very different according to circumstances. That is why, in judging whether such limits have been exceeded, one must take into consideration: who is the aggressor, and who the victim, man or woman, old or young, strong or weak; the place, time, and character of the aggression, also all other circumstances and facts which indicate what in reality has been the nature and degree of the danger incurred by the victim, and how it must have appeared to him at the moment of the attack.' It would be a good thing if the words in italics were incorporated in the English and Indian law. The rule in the Indian Penal Code, that the right of private defence must not be exceeded, is, the writer thinks, too

rigorously construed as against the person exercising such right. The Court should throw itself into his position. The German Penal Code reasonably provides that it is no offence when the right of private defence is exceeded 'through terror.'

Arts. 987-1031 are proverbs or juridical maxims, which for the most part put well-known rules of law into simple language. Simple as the principles are, their incorporation in a code can hardly be said to be unnecessary, considering that they are sometimes lost sight of by judicial officers. A few may be quoted:—

'Bad custom is of no avail, and does not make law.'

'What everybody understands in the same way has no need of an interpreter.'

'No one can be deprived of the enjoyment of things which by their nature belong to all.'

'What is born crooked can never be made straight; what is illegal in its origin can never become legal by the lapse of time only.'

'One can only give what one has; whence the rule that one cannot assign to a third person more rights than one has oneself.'

Some countries make it a criminal offence to sell land or a share in an estate of which the seller is not in possession when he sells it. Such a rule is urgently required in India, where persons having claims, or who think they have claims, and even persons whose claims cannot be called *bona fide*, sell to rich or litigious persons, thereby bringing about breaches of the peace, and entailing much worry and work on the police, the magistrate, and finally on the revenue or civil courts.

'Violence is the worst enemy of the law. If you take a thing (even your own) away from another, otherwise than by due course of law, you are said to take it by violence.'

'He who owns the land, owns the house; he who owns the field, owns the crop.'

The latter portion of this rule is acted on in India, but not the former, at least not invariably. A tenant who goes from the estate of one zemindar to that of another, 'takes up his house and walks'; that is, he takes the wooden beams, rafters, doors, the bamboo framework of the roof, &c., leaving only the mud walls standing. This appears to be the custom of the country, but the right of a tenant to do this is not admitted by the zemindar, who often uses force or intimidation to prevent its exercise. The tenant, in case of opposition, comes to the magistrate, who usually orders those who oppose to abstain from force or molestation. Still it can by no means be predicated that every magisterial court would pass the same order in such a case. This is a typical instance of the

necessity for some simple rules of law, which would eliminate all uncertainty, and, by letting people know their rights authoritatively, would prevent friction, breaches of the peace, and the expense and bitterness of litigation.

'What two persons have done, the same two can undo.'

'What is agreed between two persons, cannot bind a third person.'

'It is the height of injustice, when he who has done a wrong draws profit from it.'

'The debtor of your debtor is not on that account your debtor.'

Finally, the Civil Code of Montenegro is peculiar in that it is the result, not of commissions composed of a number of jurists, but of the remarkable intelligence and energy of a single man. If a commission be ever appointed to frame a civil code for India, it is certain that they will be able to draw many useful hints and obtain much valuable material from the General Code of Property of the Principality of Montenegro.

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Note.—A French translation of this Code has been published in Paris under the direction of the Ministry of Justice, and is easily accessible (*Code général des biens pour la principauté de Monténégro de 1888, traduit par Rodolphe Darest et Albert Rivière . . Paris. Imprimerie Nationale, 1892*).

THE AUTHORSHIP OF THE MIRROR OF JUSTICES.

IN his interesting introduction to the Selden Society's new edition of the *Mirror of Justices*, Professor Maitland, on pp. 1, li, assembles the reasons which make for and against attribution of the authorship to Andrew Horn, fishmonger and Chamberlain of London, who died in the year 1328. Excepting that his name appears upon the unique MS. of the *Mirror* together with some Latin lines of extremely doubtful meaning, there is no positive evidence connecting the work with him. 'We should almost certainly acquit him,' says Professor Maitland, 'were it not for those verses.' However, so much is clear as that Andrew Horn had the *Mirror* in his possession, that he also owned the book recently described by Dr. Liebermann under the title of '*Leges Anglorum*', and that 'he regarded these two books as forming part of a grand collection of materials which were to serve as a *Corpus Juris Anglicani*'.

Of this *Corpus*, '*the Leges Anglorum*', as Professor Maitland tells us, had for primary motive 'the glorification of the City of London, its privileges and its customs... In Dr. Liebermann's opinion this work was put together by some Londoner of John's reign' (p. xvi). The *Mirror* is in an entirely different vein: 'The article (of the Great Charter) which commands that the city of London shall have its ancient and accustomed liberties is to be understood thus: that the citizens shall have their franchises, to which they are heritably entitled by the gifts and confirmations of the kings and which they have not forfeited by any abuse, and that they shall have such of their free customs as are allowable by right and not repugnant to the law' (p. 177). This attenuating gloss can scarcely be the work of an official of the Corporation of London. The author, however, does not stop here. He adds: 'And the interpretation applicable to the case of London is applicable also to the case of the Cinque Ports and other places.' Considering the infinite number of charters to privileged places already in existence in the fourteenth century, it is not at first sight easy to advance a reason for this selection of the Cinque Ports.

In his catalogue of '*Abuses*' the author has another saying as to London, in which, as the editor of the *Mirror* remarks, 'the hand of a Londoner may be apparent' (p. 185). Speaking of the Statute of

Westminster I, he says, 'The article about the inquest *de odio et atia* is reprehensible as regards London and other privileged places where there are no knights.' Now it will be remembered that the writ *de odio et atia* was a writ to try whether when a man was imprisoned on a charge of homicide, the prosecution was malicious. Under the statute two knights were required to be present at every inquest *de odio*, and this was one of the legal burdens imposed upon knights, the trial being considered a specially 'solemn and decisive process.' What are the 'other privileged places where there are no knights' which rise up naturally in the author's mind as he mentions the privileges of London? Again, the Cinque Ports. By Edward I's charter of 1278 to the Barons of the Cinque Ports it was granted them to be 'quieti de Shires et Hundreds¹', that is to say, they were not compellable to attend the County Courts to elect knights of the shire under the eighteenth article of Magna Carta for assisting the itinerant justices to take recognitions². It may be presumed that the absence of knights was source of some personal inconvenience. Delays intervened until knights could be found and summoned. Knights resident in the neighbourhood of comparatively populous communities such as the Cinque Ports might have frequent demands made upon their services. At any rate, we are left to infer what we know from other sources, that vexations of some kind arose out of the restriction, and they may be supposed to have been of such a nature as would arise were an Act of Parliament to require the presence of county magistrates at the hearing of actions of a not infrequent class of which the cause arose in our great boroughs.

The author of the *Mirror* was no friend to sanctuaries. 'It is an abuse,' he declares, 'to suffer thieves and felons proclaimed and notorious, to be defended by sanctuaries' (p. 157). In that opinion a good many sensible laymen must have concurred. But the next two 'abuses' which he enumerates seem to point to his objections as derived from some sort of experience and not as a matter of theory: '23. It is an abuse that felons who abjure the realm are not allowed to choose their own port of departure from the realm. It is an abuse that ports are assigned to them and their journeys limited. 24. It is an abuse that these abjurors are compelled to wade into the sea and raise hue over the sea and that the foot-paths that run beside the great roads are forbidden them, and that they cannot use the roads and hospices in the manner of pilgrims.' This is somewhat different from Bracton, upon whose law the

¹ Samuel Jeake, *Charters of the Cinque Ports*, London, 1728, p. 21.

² See Stubbs, *Const. Hist.* i. 225; Merewether & Stephens, *History of Boroughs*, London, 1835, i. 557.

author of the Mirror largely relies. 'If,' says Bracton (fol. 135 b), 'having acknowledged his misdeed he has elected to abjure the realm, *he ought to choose* some port by which he may pass to another land beyond the realm of England. . . . And there ought to be computed for him his reasonable travelling expenses as far as that port, and he ought to be interdicted from going out of the king's highway and from delaying anywhere for two nights and from entertaining himself anywhere, and from turning aside from the high road except from great necessity, or for the sake of lodging for the night, but let him always continue along the straight road to the port,' &c. Bracton's care is that the felon should be got expeditiously out of the realm. What the author of the Mirror dislikes is his expulsion by a particular route. To an official mind and to the mind of a Londoner the very practices to which the author of the Mirror objects would commend themselves as judicious measures of police. The assignment of ports and the prescription of stages were the medieval equivalent of a ticket-of-leave man's report of himself to the police. They were safeguards contrived to prevent the dispersion through the country and the disappearance from the eye of justice of the criminal tramp. That in this as, I suspect, in other matters the Mirror is accurate as to the practice, notwithstanding the combined authority of Britton and Fleta that the selection was left to the criminal, appears both from the *Tractatus de officio Coronatorum* and from the Year Book of 30 & 31 Edward I¹.

Now from the Custumal of Rye we know that in Rye, Dover, Romney, and Winchelsea, criminals were allowed sanctuary². Whatever the sentiment of ecclesiastics may have been, the townsman and trader can scarcely have welcomed hordes of fugitive criminals in their midst. Their view of the privilege is set forth in the Act of 1542³, which repealed an Act of 1540⁴ making Manchester a sanctuary. The recital of the Statute of 1542 dwells upon the industrial eminence of Manchester, the 'good order strayne and true dealing of the inhabitauntes,' the consequent soundness of their commercial credit, and the attractions which these qualities offered to merchants and men of business. 'And forasmuche as dyverse light and evill disposed persons syns the making of the said Statute, for certen offences by them commytted and done, have nowe of late reasorted and made theire abode within the said towne of Manchestre, and lived in ydelnes, not allonly geving evill occasion to honest and true labourers and seruauntes within the

¹ Year Book, 30 & 31 Edw. I, App. i. p. 509: 'Nota qe cely qe voudra forjurier la realme prend havene la quele le Coroner ly voudra assigner, et mye autres.'

² W. Holloway, *The History &c. of Rye*, London, 1847, p. 161.

³ 33 H. VIII, c. 15: 'For the Sanctuary off Manchestre.'

⁴ 32 H. VIII, c. 12: 'Concerning Sanctuaries.'

said towne to live in such sorte of idlenes, but also have allured and enticed diverse seruautes and labourers within the said towne to practise and use unlawfull games, wherby they have consumed and mysspent their masters goodes being in theire handes ; And over that synts the reasorte of the said persons to the said towne there hath ben commytted and done diverse theftes and felonies,' &c. Then follows a description of these misdeeds and of the disencouragement thereby offered to traders visiting the town, so that 'the said persons whiche used to bring thider the said Cottons do also withdrawe theym selfes, whiche shalbe to the utter decay and desolacion of the said Towne within short tyme, if the said Offenders and Sanctuary men and suche other shalbe suffred to make theire abode within the said towne ; And also forasmuche as the saide Towne of Manchester is not walled, wherby the said Sanctuary men may or can saufely be kept in the nyght Season, but that they may and do contynually escape oute of the same Towne by nyght, and commytte sundry great robberies and felonies upon the kinges loving and obedient subjectes repairing to the same Towne,' &c. Although the Cinque Ports were not unwalled towns, it can readily be believed that this indictment was applicable to their case and that the throng of felons was a terror to the country side.

It is not easy to assign a meaning to the 'abuse' that abjuring felons 'cannot use the roads and hospices in the manner of pilgrims.' Would the disguise of a pilgrim's garb facilitate their misdeeds or the reverse? Does the author of the Mirror intend to convey that this had been the custom but that it had been abolished? Bracton says nothing about the dress of the pilgrim as indispensable to the abjuring felon. Professor Maitland tells us that he 'hurried dressed in pilgrim's guise to the port that was assigned to him¹.' I have not found authority for this. It may have been the practice at a later date, but the author of the Mirror, who is a principal authority, gives a version of the procedure not altogether compatible with it. 'If he (the abjuring felon) acknowledges mortal sin (i.e. felony) and prays to go forth from the kingdom without the protection of the Church, let him come to the limit of the sanctuary barefooted, ungirt, *in his coat or shirt only*, and swear that he will keep the direct road to such port or such passage as he shall have chosen, and that he will not remain in any place two nights together until that for such mortal sin as he shall have acknowledged in the hearing of the people he has left the realm, and further that he will not return in the king's lifetime without his leave, so help him God and the Holy Gospels. And then let

¹ Hist. of English Law, ii. 589.

him take a cross and bear it so long as he shall be in the protection of the Church¹. Now the guise of a pilgrim was not a cross. 'Pilgrims in the middle ages were known by a peculiar garb and various badges; the hood and cape, the staff and scrip and water-bottle, and the low-crowned hat turned up in front and fastened with strings being common to all².' From this I infer that at the time at which the Mirror was written the pilgrim's garb was not in vogue for abjuring felons, but that they followed the rule laid down in Britton, going 'barefooted, ungirded and bare-headed, in their coat only³', and that in the author's opinion its compulsory adoption would be for some reason or other desirable.

What was this reason? Why should the adoption of a disguise which should cloak the difference between criminality and piety be an advantageous reform? The answer is perhaps to be found by turning back to the author's 'Abuse': 'It is an abuse that abjuring felons cannot use the roads and hospices in the manner of pilgrims.' There is one obvious meaning to be attachable to the phrase 'cannot use the roads.' It is that they cannot travel in a body, obviously a precautionary measure of police, if such a prohibition were in force, but one for which it must be doubted if need existed, since it can scarcely be supposed that felons abjured in crowds. I incline to interpret it in connexion with the words following, 'and hospices,' that is, the inns and houses of rest of the pilgrims, and then the meaning of the author's objection becomes apparent. The *Tractatus de officio Coronatorum* is more precise than the Mirror as to the felon's route: 'Let the felon be brought to the church door and there be assigned unto him a port, near or far off, and a time appointed to him to go out of the Realm, so that in going towards that port he carry a cross in his hand, and that he go not out of the king's highway, neither on the right hand nor on the left, but that he keep it always until he shall be gone out of the land⁴'. The oath of the felon himself was 'et quod non debeo abire de alta via, et si faciam volo quod sim captus sicut latro et felonus⁵'. So far the strict letter of the law. Its text is of unknown date, but it bears internal signs of being prior to Bracton, whose version imports the mitigations practically found necessary⁶.

¹ This is in effect the *Tractatus de officio Coronatorum*, printed in vol. i. p. 250 of the Statutes of the Realm.

² Encycl. Britannica, 9th ed., s. v.

³ Britton, edited by F. M. Nichols, Oxford, 1865, i. p. 64.

⁴ Statutes of the Realm, vol. i. p. 250. So also the Statutum Wallie, 12 Edw. I, c. 5 (1284).

⁵ Ibid. I have followed the Latin text here because the English translation 'I shall not go out of the highway' does not reproduce the original, and because this original stands half-way between the absolute prohibition of the first quotation and Bracton's mitigating version of the obligation.

⁶ See p. 87 supra, and p. 90 inf.

Upon another point the English version of Bracton has been already quoted. The Latin text is in this connexion more instructive : 'Et computari ei debent rationabiles dietae usque ad portum illum et debent ei interdici ne exeat regiam viam, nec moram faciat alicubi per duas noctes, nec alicubi se divertat, nec multum declinet a via nisi hoc fuerit ex magna necessitate vel hospitandi causa¹' Here 'divertat,' which Sir Travers Twiss translates not erroneously 'from entertaining himself,' has its common meaning of entertaining himself or putting up at an inn (*diversorium*). In this Bracton corroborates the complaint of the Mirror that the abjured felon 'cannot use the roads and hospices in the manner of pilgrims.' Possibly this prohibition obviated the need of an Innkeepers' Liability Act, probably it was supported by the common sentiment of pilgrims, a body recruited from all classes of society, and particularly averse, it may be supposed, to companionship of social outcasts.

It has been observed that Bracton introduces an exception in favour of the abjuring felon contrary to the strict letter of the law, but probably representing the usage which had grown up. Leaving out of consideration the indulgence allowed as arising 'ex magna necessitate,' the felon is now permitted to turn off the high road for the special purpose of 'lodging for the night,' to adopt Sir Travers Twiss' translation of *hospitandi causa*. And this deviation is, when made with that object, even allowed to be considerable (*multum*). We are now in a position to understand this one of the author's 'Abuses.' He objects to a system which, while it drains the country of felons through fixed channels—as will be seen presently, and through practically one outlet—has the effect of driving them off the high roads where they could find shelter and be comparatively under supervision, to solicit the unwilling hospitality of the country side. They were without a garb to assist identification, since hatless and barefooted vagrants could not have been uncommon, and a wooden cross of unspecified and therefore elastic dimensions would naturally be valueless for such a purpose. They could rove at will, a predatory and homicidal peril to dwellers in the neighbourhood of their route and of their port of embarkation. If they may not use the highways as pilgrims, it would be better and safer that they should travel along 'the footpaths that run beside the great roads.' By such an arrangement their wanderings would be restricted. If in pilgrim's garb, their identification would be assisted while the pious would still escape the contamination of their company.

In this connexion there is one portion of 'Abuse' 24 which has not yet been commented upon : 'It is an abuse that these abjurors

¹ Bracton, f. 133 b, 136.

are compelled to wade into the sea and raise hue over the sea¹. For explanation of this we must turn back to the 'Abjuramentum et juramentum Latronum'² already quoted. The felon after making oath before the Coroner 'I shall haste me towards the port of such a place which thou hast given me,' adds 'and that at such a place I will diligently seek for passage, and that I will tarry there but one flood and ebb if I can have passage, and unless I can have it in such a space I will go every day into the sea up to my knees assaying to pass over.' There are passages in the *Mirror* which sometimes incline the reader to the suspicion that the author had been guilty of rape. A chapter in the Statute of 1285, which he repeatedly condemns³, made rape a capital crime. Had the author of the *Mirror* as an abjuring felon undergone the discomfort and prejudice to health involved in the grotesque ceremony which he pillories as an 'Abuse'⁴? Professor Maitland inclines favourably to him in this matter. But the passage which I have quoted suggests, at any rate, that he had been an eyewitness of the performance, just as the other passages suggest that he had personal experience of the inconveniences of the system under which abjuration was effected.

It has been seen that, after citing the abuse of the sanctuary system, the author proceeds to object to the assignment to abjuring felons of a prescribed port of departure, a custom as to the existence of which, text-books notwithstanding, the evidence of the *Mirror* has already been found confirmed. One of the first objects which would have met the traveller's eye when he set foot on English soil would have been a group of murderers and robbers who were to be set loose somewhere on the continent of Europe, there to gain their living as best they could. . . . Dover was the port most commonly assigned to them. . . . Thus the stranger might, if he pleased, and if he spoke English, have heard from these desperate wayfarers much that he might have desired to know about the condition of the roads in every part of the country. He might have found among them not only some who had travelled from Surrey or Middlesex in three days or four, but some who had travelled from Yorkshire in nine⁵. If, therefore, the surmise be justified that the hostility of the author of the *Mirror* to the customary incidents of abjuration was based

¹ *Mirror*, p. 158.

² *Statutes of the Realm*, i. 250.

³ *Mirror*, pp. 28, 195; *Abuse* 117 (p. 172).

⁴ The *Tractatus de officio Coronatorum* in its last cause ordains 'that he (the abjuring felon) shall not return without special favour of our Lord the King,' so that the author might have been the medieval equivalent of a ticket-of-leave man returned from transportation.

⁵ L. O. Pike, *History of Crime*, i. 232-3. Pollock & Maitland, *Hist. of English Law*, ii. 589, also say that they 'were shipped off at Dover to France or Flanders.' I have not been successful in finding the original authority for this, unless it be 9 Edw. III, c. 8, which restricts pilgrims to the port of Dover.

upon a personal acquaintance with its drawbacks, that experience must have been gained in the neighbourhood of Dover, in which, as in the neighbouring Cinque Ports, that right of sanctuary which affronted his common sense also flourished.

There are other references scattered through the book, singly of no import, but which together afford a convergence of evidence that the author wrote that which he knew and that his knowledge was acquired in the neighbourhood of the Cinque Ports. For instance, in his extension of the crime ('sin') of perjury to all cases in which oaths of office and other obligations had been broken he says, 'By perjury sin all those officers who are guilty of negligently conniving at the alienation, occupation, or subtraction of the franchises and rights of the king and those who anywhere in the kingdom change old forbidden money for new save at the king's exchange.' There were several royal-exchanges in England. One of them was in London, one at Dover, where tables of rates of exchange are referred to as in existence in 1292 or 1299¹, nine years at most after the latest date assigned by Professor Maitland to this book. It will be observed, however, that the author speaks not of the exchange of foreign moneys, but of 'old forbidden money.' In 1283 and 1284 the Government of Edward I was much exercised by the quantities of foreign and counterfeit money imported into England. It appears that on the other side of the Channel and in Germany there flourished regular manufactories of spurious English coin, in which also genuine English coin was clipped or otherwise treated for re-exportation to England. In order to check these practices King Edward in 1283 'appointed John de Burn to the care of the ports of Dover and Sandwich and the ports adjacent, with authority to seize, either in ships or on shore, all money brought from foreign parts under the protection of any person whatsoever, and to inspect and examine the same as to form, weight and fineness by the view of twelve just and lawful men of the ports aforesaid, and to apply the clipped and counterfeited money from whatsoever quarter it might come, to the king's use².' It may, of course, be that the passage in the *Mirror* was only suggested by the current topic at that date; it may also be that it was written by a man familiar with the proceedings at the Dover exchange and, as will presently be seen, refer to the reign of King John.

The author's sixty-ninth Abuse is 'that foreigners who cannot find pledges are not receivable in actions on the surety of Frenchmen.' The medieval pledge was a person, and the text appears to

¹ The Statutes of the Realm give 1299 as the date of the proclamation rather than the statute. Ruding believes it to be 1292. R. Ruding, *Annals of the Coinage*, London, 1840, i. 198 (3rd ed.).

² Ruding, i. 196.

mean that without English sureties a foreigner was not allowed to sue. This is one of those passages which was scarcely likely to come from the pen of a Chamberlain of London in 1285-1290, when the liberties of the City were in the king's hands owing to its opposition to the jurisdiction of the king's justices¹. Between the Court and the City there raged a secular feud over the privileges of aliens. At this very time Edward I was issuing commands to the sheriffs to hear the plaints of strangers. The inference will commend itself with varying degrees of probability to different minds, but it is scarcely likely that an author whose temper was to maintain the rights of the foreigner should at a later date so far establish himself in the confidence of the City of London as to be selected as the counsel to represent its privileges². Whether this be so or not, the writer of the passage in the *Mirror* was not in sympathy with the claims of the Londoners, but realized the practical difficulties interposed between justice and the forlorn stranger who landed on our shores. He was acquainted with their tongues. 'No doubt the Chamberlain of London had occasion to converse with Hanseatic merchants³'. He derives the English from the Germans⁴. He tells us what the law is in France⁵. Certainly if his intercourse with foreigners did not take place in London, as may have been the case, it must have been at one of the sea-ports.

There is another 'Abuse' which by no means savours of London. 'Albeit the article (of the Great Charter) which commands that petty assizes⁶ be taken in their own counties was made for the easement of jurors, none the less it is disregarded, for the justices cause the jurors to journey to the extreme boundaries of the counties, whereas it would be better that the justices should journey from hundred to hundred and not labour so many folk⁷'. That the grievance really existed we know from the Statute of 1293⁸, which is careful to fill up an omission from the Statute of Westminster the Second, c. 30, by the provision that the justices should sit 'diebus et locis quibus melius et plus ad commodum populi viderint esse faciendum.' At that remote period and long afterwards the convenience practically consulted appears to have been that of the judges. As late as the reign of Elizabeth we hear of assizes for Kent

¹ Stubbs, *Const. Hist.* iii. 571.

² During the Iter of 1321. R. Sharpe, *London and the Kingdom*, i. 143, 147.

³ *Introduction to the Mirror*, p. xviii.

⁴ *Ibid.* p. xxxviii.

⁵ For the actions triable at Petty Assizes see Pollock & Maitland, *Hist. Eng.*

Law, i. 567.

⁷ *Mirror*, p. 179.

⁸ *Statutum de Justiciariis assignatis—Statutes of Realm*, i. 112.

at East Greenwich¹, at Sevenoaks², and at Gravesend³. Similarly I have met with a case in the Exchequer Rolls of the reign of Henry VIII in which the Berkshire assizes were held at Grandpont, known to Oxford men as the other side of Folly Bridge and technically within Berkshire, though at its extreme limits. To a dweller in the neighbourhood of the Cinque Ports and within the boundaries of Kent the economy of time and trouble enjoyed by the justices as a consequence of fixing their assize in the neighbourhood of London might well appear an abuse worthy of special reprobation⁴. In 1504 the inconvenience of holding the Shire Court at Chichester 'which is in the extreme partie of the same shyre, the same shyre (Sussex) being lxx myles in lengthe,' was remedied by an Act constituting Lewes an alternative venue⁵.

It has been said that no great reliance can be placed upon any of these indicia. But they are sufficiently prominent and sufficiently numerous to arrest attention. Accepting the conclusion to which Professor Maitland inclines that the Mirror was not the work of a Londoner, to what other part of the country can we trace its source but to the neighbourhood of those towns which it selects for mention and grievances associated with which specially impress themselves upon his mind?

Professor Maitland has himself called attention to the archaic tendency disclosed by the author: 'In a good many instances the "abuse" would disappear if the law of 1200 or even of 1250 could be restored.' He then cites eleven examples, as a few among many, of these 'abuses' or changes in the law. The number of passages in the Mirror that point to the conditions obtaining in the early and middle part of the thirteenth century can scarcely be accidental. The Mirror describes at length, though not as a contemporary procedure, the ordeal by fire, which had ceased in John's reign⁶. He speaks as if trial by battle was a frequent incident in the case of contract debts, at least up to £10. Professor Maitland has told us in his History that 'it disappeared soon after Glanvill's day'⁷, and Glanvill died not long after 1190⁸. He tells us that burning was formerly the punishment for arson⁹. In John's time it was so¹⁰. He alleges as contemporary law that any one might slay an outlaw¹¹. So, perhaps, he might do in John's time, but in Bracton's

¹ E. Hasted, *Hist. of Kent, Canterbury*, 1778, i. 28.

² *Ibid.* p. 353.

³ *Ibid.* p. 451.

⁴ See also *Mirror*, p. 195.

⁵ 19 H. 7. c. 24, *De Turnis Vicecomitis apud Cicestre et Lewes vicissim tenendis.*

⁶ Pollock & Maitland, *Hist. Eng. Law*, ii. 597. It was abolished by the Lateran Council in 1215.

⁷ *Ibid.* p. 630.

⁸ *Foss, Lives of the Judges*, i. 383.

⁹ So Britton, i. 41, but not Bracton or Fleta.

¹⁰ Pollock & Maitland, *Hist. Eng. Law*, ii. 490. Mr. Nichols also cites a case in his notes to Britton (l. c.); cf. 5 H. III (1220-21).

¹¹ *Mirror*, p. 125.

day only if the outlaw is resisting capture or fleeing from it¹. 'None should be outlawed,' he says, 'save for mortal sin'², i.e. capital crime. This is apparently a protest against the method arising in Bracton's time of using outlawry as process. He speaks as though the practice were for eyres to be held every seven years³, which we know to have been the case in the reign of Henry III and presumably of his predecessor⁴. In a passage to which reference in another connexion has already been made, he ascribes the 'sin' of perjury to 'those who anywhere in the kingdom change old forbidden money for new save at the king's exchange.' King John in 1204 made an ordinance 'prohibiting all other to make any exchange of money or silver, but at the king's exchange'⁵. 'Henry the Third, in the sixt yeare of his Raigne wrote to the Seabins and men of Ipree, that he Assensu Consilii had made proclamation, That no English man or other should make Exchange but only at his Exchange at London and Canterbury'⁶. The significance of this exception will presently become apparent.

The author's general attitude towards the Crown is twofold. Upon matters as to which the Crown is in conflict with the Barons, such as the 'franchises,' he supports the prerogative⁷. Where the Crown is at issue with the nation at large, as for instance in the question of holding parliaments⁸, he is for the people, and so incidentally for the Barons as representing the popular party. To express his position in a modern phrase, his political ideal may be said to be that of the Liberal party of John or Henry III's reign. He expresses himself at times as though he, or some one whose papers he was editing, entertained a personal dislike to the king. His list of 'Abuses' begins: '1. The first and sovereign abuse is that the king is beyond the law, whereas he ought to be subject to it, as is contained in his oath.' It cannot be doubted that this refers to the coronation oath. Of the coronation oaths given by Bishop Stubbs that of Henry III, taken on the death of John, most resembles this statement: 'Quodque leges malas et iniquas consuetudines, si quae sint in regno, delebit et bonas observabit'⁹. It is not certain that the coronation oath of Edward I has been preserved¹⁰, and Professor Maitland has forcibly remarked that the author does not seem to know much of the Norman kings, so that it must not be assumed that he is referring to the oath of William the Conqueror.

¹ Pollock & Maitland, *Hist. Eng. Law*, i. 460.

² *Mirror*, p. 193.

³ *Ibid.* p. 145.

⁴ L. O. Pike, *Hist. of Crime*, London, 1893, i. 453.

⁵ Cambium Regis, London, 1628, p. 2.

⁶ *Ibid.*

⁷ *Mirror*, p. 113.

⁸ *Ibid.* p. 155.

⁹ Const. Hist. Engl. ii. 18. The actual words of the coronation oath of John have not been preserved. Arthur Taylor, *The Glory of Regality*, London, 1826, p. 331, n. 14.

¹⁰ See Stubbs, Const. Hist. ii. 105, n. 2.

Though it may be doubtful at which king he is pointing, it is quite certain that his political ideal carries him back to the dominance of the baronial party under John or under the Provisions of Oxford in 1255. It is that of 'a parliament of counts or earls meeting twice a year in London, which aids the king in governing the people and hears all causes in which the king is defendant¹.' He expressly refers us to King John as governing through the earls². He dislikes aliens influential with the king. 'It is an abuse that whereas parliaments ought to be held . . . twice a year and at London, they are now held but rarely and at the king's will for the purpose of obtaining aids and collection of treasure. And whereas ordinances ought to be made by the common assent of the king and his earls, they are now made by the king and his clerks and by aliens and others who dare not oppose the king, but desire to please him and to counsel him for his profit, albeit their counsel is not for the good of the community of the people, and this without any summons of the earls or any observance of the rules of right, so that divers ordinances are now founded rather upon will than upon right³.' The government of the king through the earls may be an allusion to the twenty-five barons to whom the execution of the Great Charter was committed⁴, or to the Council of Fifteen designed to control Henry III in 1244⁵. The suggestion that the king is governed by 'his clerks and by aliens' is plainly inapplicable to the author of the Statute 'De religiosis.' But by the side of this passage may be placed that of Dr. Stubbs which describes the state of affairs at the time of the first parliament of 1258: 'Three papal envoys in rapid succession had arrived, each with more stringent orders than the last. . . . The court was full of foreigners whose wealth and extravagance were in strong contrast with the state of beggary to which Henry declared himself reduced⁶.' The situation closed with the Parliament of Oxford and the flight of the foreigners. The suggestion that Parliaments should be held twice a year cannot fail to remind us of the plan of three annual Parliaments projected in 1244⁷.

Another point raised by the *Mirror* in connexion with the royal prerogative carries us back perhaps to the same period. It is contained in the words already quoted, 'all causes in which the king is defendant.' In allusion to this Professor Maitland remarks, 'The dream that the king of old time could be sued in his own court is a dream that is becoming popular. It is becoming an article of faith among those who have complaints against the king

¹ *Mirror*, Introd. p. xxxix, p. 7, 8, 155.

² *Ibid.* p. 156.

³ *Stubbs, Const. Hist.* i. 542.

⁴ *Stubbs, Const. Hist.* ii. 73.

⁵ *Ibid.* p. 36.

⁶ *Ibid.* ii. p. 76.

⁷ *Ibid.* ii. 76, n. 2.

for the time being¹. In the History of English Law the authority of Bracton is relied upon that the belief was a delusion and that the king never had been suable². On the other hand, we have the reported dictum of a judge in 22 Edward III (f. 3, Hil. pl. 25) that he had seen a writ against the king. On this Professor Maitland comments, 'If he had seen anything of the kind, it was some joke, some forgery, or possibly some relic of the Barons' War³'. These last words may very well contain the solution⁴. Omitting the doubtful precedents of John's reign, it must be remembered that Bracton wrote before 1258. What is more likely than that, precedent or no precedent, while the king was in tutelage of the Barons under the Provisions of Oxford efforts were made to realize this 'dream'? And if this be so, it is again to this period that the passage of the *Mirror* points.

Accepting Dr. Stubbs' identification of the author of the *Annales Londonienses*, we have in Andrew Horn a writer whose literary activity, so far as we know, began about the date 1289 and ended in 1330. In 1328 also Andrew Horn had made his will, possibly in anticipation of death. At any rate, the will and the abrupt conclusion of the *Annales* together are of some significance, and the last mention of him in the City Annals appears to have been in 1327⁵. If he were twenty-five in 1289, which is probably a minimum age for the first efforts of a medieval historian, he would be sixty-six in 1330. But, as has been seen, the book largely assumes the prevalence of legal as well as legislative conditions, either actually existing or in the way to come into being at various dates during the first half of the thirteenth century. Indeed, as Professor Maitland notes, 1200 is the year in which the law, in the author's mind, had attained an ideal finality. On the other hand, the *Mirror* was not written later than 1290, curiously enough, the year after the commencement of the *Annales*.

It may very well be the case that the MS. was, as Professor Maitland holds⁶, transcribed under the direction of Andrew Horn, as it undoubtedly belonged to him. But there is no evidence to show that this was the original MS. On the contrary, 'It is full of mistakes. Some of these look to me like the mistakes of a clerk who is writing from dictation: they are mistakes committed by the ear; but others seem to be mistakes of the eye⁷'. They are not author's mistakes where the author was his own transcriber.

¹ *Mirror*, Introd. p. xlviij.

² *Hist. Eng. Law*, i. 501.

³ *Ibid.* 500.

⁴ 'Records of John's reign . . . show also that while that king was in subjection to the executive council established by his Magna Charta, he was sued in several instances by those whom he had, in the previous troubles, dispossessed extra-judicially of their land (Close Roll 17 John, vol. i. p. 218).' Carl Güterbock (translated by Brinton Coxe), *Bracton*, Philadelphia, 1866, p. 29.

⁵ Sharpe, *London and the Kingdom*, i. 161.

⁶ *Mirror*, Introd. p. xx.

⁷ *Ibid.* p. lii.

Unless we are to accept Professor Maitland's theory that in the thirteenth century an author sat down to write a law book which was an elaborate jest, somewhat in the style of the *Comic Blackstone*, the conclusion seems to be that the *Mirror* is a compilation of an earlier and a later treatise¹. To the earlier belong in general the feudal tendencies, to the later those which favour the royal prerogative. To the earlier belong the propositions of law of 1200-1250, to the later those which refer to the statutes of Edward I. The editor was a better scribe than he was a lawyer or historian. He dexterously blended heterogeneous material into a whole and possibly adopted the employment of the word 'Abuse' as a literary artifice to note the changes in the law of which he disapproved. 'It is a variegated, tessellated book'².

It has been seen that the *Mirror* does not much concern itself with London. Indeed, its independence of partisanship with the citizens, which Professor Maitland notes³, is a strong indication adverse to the authorship of Andrew Horn. But the '*Leges Anglorum*' edited by Dr. Liebermann is a work 'put together by some Londoner of John's reign. . . . A half-hearted attempt has been made to carry on the historico-legal discourse in the reigns of Henry III and Edward I⁴'. There is a striking literary parallelism here, if there is anything in the idea that the *Mirror* belongs to two different dates, the beginning and the end of the century. Is it possible that the same editor was at work in both cases? Is it an accident that both this book and the *Mirror* were in the possession of Andrew Horn? Was John Horn, alderman, sheriff and coroner of the City of London in the early years of Edward I, the father of Andrew Horn? Was John Horn one of the contributors to the *Mirror*? He knew French, for in 1273 he was one of four citizens of London appointed to confer at Paris on the proposals for peace with Flanders⁵. It may also be noted that one of his three colleagues was a financier, Gregory de Rokesley, 'shortly to be appointed master of the exchange throughout England.' We have seen how urgent the editor was on the maintenance of the regulations of the exchange! And John Horn, like the editor, must as coroner have had a legal training.

Whatever the origin and authorship of the '*Leges Anglorum*', the internal evidences of the *Mirror* which I have attempted to

¹ 'What shall we call its author? Is he lawyer, antiquary, preacher, agitator, pedant, faddist, lunatic, romancer, liar? A little of all, perhaps, but the romancer seems to predominate.' Introd. p. xlvi. Professor Maitland also speaks of it as 'a squib, a skit, a topical medley, a variety entertainment,' &c. (p. xix). I confess, with much respect for the Professor's learning, that there appears to me to be a certain *dyspepsia* in this criticism.

² *Mirror*, Introd. p. xl.

³ Sharpe, *London and the Kingdom*, i. 116.

⁴ *Ibid.* p. xl.

⁵ *Ibid.* p. xvi.

set out here left these conclusions upon my mind. First, that the Mirror was an edited or compiled work; secondly, that it was largely written before 1250; thirdly, that the author or editor was probably a dweller in the neighbourhood of the Cinque Ports.

With these impressions distinctly formed, I found myself by the mere accident of a bicycling tour at the ancient church of Appledore on the borders of Kent and Sussex. Appledore is in Kent, but it is within sight of Rye and Winchelsea, almost of Hythe on the east and Hastings on the west. It is close to the main roads from the south and west of England to Dover. It is actually within the liberty of one of the Cinque Ports, the town and port of New Romney¹.

'On the S. side (of the Church)² is a chantry with tomb, believed to belong to the extinct family of Horne, of Horne Place³.' Hasted is disposed to assign it to Michael Horn, Sheriff of Kent in 1405-1406⁴. 'Hornes place, or Hornes farm, as it is now called, is an estate in the North East part of this parish, the mansion of which was for a great length of time the residence of the family of that surname and till they removed to the adjoining parish of Kenardington in the reign of King Henry VII, on their purchasing that manor, on which they likewise fixed their name⁵'. . . . 'This estate (Hornes Place) is now called Great Horne, to distinguish it from the estate called Little Horne, in the adjoining parish of Kenardington. Great Horne seems from the extensive foundations and the quantity of stones dug up to have been very considerable. The only part of the ancient structure now remaining is what was the chapel which adjoined to the mansion house⁶'.

Of this family's early history not much is known. Two noticeable facts are, however, recorded by the historian of Kent. 'An ancestor of this family, Ralph de Horne, was one of the Recognitores Magnae Assiseae or Justices of the Great Assise in the reign of King John, persons of no small account before the institution of Justices of the Peace. His descendant William de Horne of Hornes Place was one of the Conservators of the Peace in the first year of King Richard II (1377⁷).' At the interval of a century and three-quarters we find the Hornes vested with judicial office. Is it too great a stretch of imagination to say that

¹ E. Hasted, *Hist. of Kent, Canterbury*, 1790, iii. 118.

² A church existed here at the time of Domesday, *ibid.* The living was appropriated by the Priory of Dover, a cell of Canterbury, about 1234; *Dugd. Monast.* iv. 536. If the Hornes were at this time patrons, of which I have found no record, there would be a link between them and Dover, and a slight presumption of the possession by them of some interest in that port.

³ Murray's *Handbook to Sussex*, 1893, p. 27; Hasted, iii. 120.

⁴ Hasted, iii. 119; cf. i. lxxxv. ⁵ *Ibid.* iii. 119. ⁶ *Ibid.* 120, n. (g).

⁷ *Ibid.* 116, n. (u).

it was a family in which the study and practice of the law was traditional¹?

The Recognitors of Grand Assize, it must be remembered, discharged functions of a far more complex character than those of the modern Grand Jury. 'The assisa or magna assisa, as it was usually called, was a mode of trial confined to questions concerning (1) the recovery of lands of which the complainant had been disseized, (2) rights of advowson, and (3) claims of vassalage affecting the civil status of the defendant².' In an age when analytic distinctions of law and fact were not always observed, it can well be believed that when 'the recognitors in a grand assize were called upon to say whether the demandant had greater right than the tenant, in so doing they had an opportunity of giving effect to their own opinions as to many a nice point of law³.' More than this, their services must have often been in request, for in 1258 men said that in some counties there were not knights enough to make up a Grand Assize⁴. And this complaint has already been seen to have been in the mind of the author of the *Mirror*⁵.

There is one more peculiarity associated with the parish in which Horne's Place is situate. The Prior of Canterbury was lord of the manor, and a court leet and a court baron were held here yearly. The author had a dabbling acquaintance with canon law. On the strength of this it has been suggested that he may have had a place in the Court of Arches. It is a suggestion equally probable that a son of the lord of the manor of Horne's Place acquired some canonical learning in the school of his neighbours, the prior and monks of Canterbury. His references to Holy Writ, his religious reflexions, and his dogmatic theology smack of such a source and are 'a very distinctive feature of this book'⁶. Has an interest in Canterbury any part in his zeal for the royal exchange?

This smattering of the canon law and the fairly balanced attitude maintained by the author between ecclesiastical and secular claims is one of the features earliest noted by Professor

¹ The Conservators of the Peace replaced the Justices of Trailbaston and were probably not appointed with the indifference as to their legal qualifications which accompanied the nomination of modern magistrates. See Pike, *Hist. of Crime*, i. 222-3.

² W. Forsyth, *Hist. of Trial by Jury*, London, 1852, p. 122.

³ Pollock & Maitland, ii. 627.

⁴ Oxford Petition, c. 28; Prov. West. c. 8; Stat. Marl. c. 14; P. & M. ii. 629. For a parallel difficulty in the Sheriffs' Tourns, see 11 H. 7. c. 26, and 19 H. 7. c. 16. It is curious that the remission of the penalties of high treason incurred by 'Gervys Horne late of Appuldore in the countie of Kent squyer,' in favour of his son William, a minor, in October 1495, is expressly recited as being 'at the grete instaunce' of the Archbishop of Canterbury, John Morton (11 H. 7. c. 30). Horne was evidently a Yorkist, and perhaps implicated in Perkin Warbeck's attempt upon Deal in the previous summer.

⁵ *Mirror*, Introd. p. xxxiii.

⁶ *Ibid.* p. xxx.

Maitland. There are others upon which Professor Maitland lays stress, again insignificant when isolated but of a certain convergent force. The three spheres of jurisdiction of Grand Assize have been enumerated. It is remarkable that upon each of these the Mirror has something to say and upon each of them, according to Professor Maitland, entertains very independent views. It is, the author tells us, 'an abuse to deny the same Assize (the Assize of Novel Disseisin) to the ejected tenant for term of years¹', and it is also an abuse to hold that this Assize does not protect the seisin of advowsons.' Professor Maitland speaks of these views as 'heresies' and 'crotchets.' It may very well be that they were the 'heresies' and 'crotchets' of a man familiar with these assizes or of a court whose 'crotchety' proceedings were noted by a Grand Recognitor, and his notes the foundation upon which a later editor built the superstructure of an 'abuse.'

Professor Maitland has noted two apparently divergent tendencies in the Mirror. On the one hand, he is favourable to local franchises. 'The seigniorial jurisdiction of the Court-Baron which is exercised by the suitors as "judges ordinary" is warmly defended against the new-fangled writs which encroach upon the domain².' The reason is stated nakedly enough by the author. 'The lords of the fees . . . lose the profits of their courts³,' a consideration likely to be present to the mind of one sprung from manorial lords. The inconveniences also of journeys to Greenwich, already adverted to, may have been present to the mind of a parishioner of Appledore. On the other hand, the author is strong upon the royal prerogative as the ultimate source of franchises. 'About this warmly-controverted matter (the question whether franchises could be claimed by prescription) we may find in the Mirror a doctrine which an attorney-general could have subscribed⁴.' Now the doctrine of the Mirror precisely fits the case of the franchises of the Cinque Ports. These were, in the case of Dover, from time immemorial. Professor Montagu Burrows speaks of 'the possession by Dover in the time of the Confessor of substantially the same franchises which were enjoyed by the Cinque Ports collectively, when we find those franchises more fully defined in much later times⁵.' Nevertheless Dover was governed by the king's bailiff (*praepositus*) or reeve, a sign of the source from which those franchises were derived. The same privileges were conferred by Edward the Confessor upon Sandwich, Hastings,

¹ On the close connexion of the Grand Assize and the Assize of Novel Disseisin see Pollock & Maitland, i. 125, 126.

² *Mirror*, Introd. p. xlvi.

³ *Ibid.* p. 191.

⁴ *Ibid.* p. xli.

⁵ *The Cinque Ports*, London, 1892, p. 43.

Hythe and Romney¹, in the liberty of which last town Horne's Place was situate. If the author of the Mirror had been brought up in such a spot he could scarcely have failed to be alike zealous for franchises and for the royal prerogative as their source. He would have been keenly alive also, as we know to have been the case, to the inconveniences arising from the sanctuarial privileges of Romney, to the unwisdom of the indulgence which allowed felons undistinguished by pilgrim's garb to wander from the high road, and to the absurdity of prescribing to them but one and that a neighbouring port of departure. Is it a mere accident also that Andrew Horn the custodian of the Mirror and all the other Horns of this date of whom we know anything were of the Fishmongers' Company, as became a family whose home was within sight of the sea²?

It is not possible within the limits of this REVIEW to enter into the question of the legal value of the statements of the Mirror as to the rights of villains and its insistence on the distinctions between villains and serfs. I have elsewhere³ attempted to justify the opposition of the Mirror to the Romanizing doctrine which, popularized by Bracton, attempted without success to identify the two classes. One topographical fact, however, in connexion with this question of authorship is remarkable. Horne's Place is, as has been said, on the borders of Kent and Sussex. The analysis of the Returns for Sussex of the Domesday Survey show these peculiarities:—Sussex among the Southern counties has the smallest percentage of 'servi.' The average for the whole area surveyed was nine per cent. of the population. Nine per cent. is also the general average for the South of England, chiefly in which 'servi' existed, none being found as far North as Yorkshire. Nine per cent. is too the average of Kent. The average of Sussex is four per cent. On the other hand, of all the Midland and Southern Counties, Sussex ranks first for the number of its 'villani,' being fifty-seven per cent. of the population, and Kent presses it hard with fifty-four per cent.⁴ In these counties, it is clear, full recognition was accorded to whatever superior rights the villani possessed; and if in any part of England we should have expected to find these rights asserted, it is just here where the class was most numerous and most strong.

The conclusions then at which I arrive are, that the Mirror is the joint work of an author sprung probably from the Hornes of Horne's Place, edited and enlarged by the 'pietas' of another of

¹ W. Holloway, Hist. of Rye, London, 1847, p. 5.

² Mirror, Introd. p. xii.

³ Trans. R. Hist. Society, 1892, pp. 192-262.

⁴ See the maps in Sebohm, English Village Community, 2nd edition, London, 1883, p. 87.

the same family, and transcribed under the direction of Andrew Horn, an offshoot of the same stock. The several contributions of the editor who gave it the form rather than the substance of a homogeneous whole and of the original author it is perhaps impossible at this date satisfactorily to distinguish. That this judgment falls far short of certainty I am well aware. It may be thought that I have pressed to the foreground facts making for the theory, but its outline was originally inferred from the facts. If Professor Maitland's identification of Andrew Horn's handwriting be correct¹, Horn's reference in the 'Leges Anglorum' to the Mirror of Justices certainly does not look like the reference of an author to his own work. And if the Mirror were a legal family heirloom, there is an obvious explanation of the esteem with which Andrew Horn regarded it, the care with which he caused it to be transcribed, the identification of the work with his family name, and the uniqueness of the manuscript².

I. S. LEADAM.

¹ *Mirror*, Introd. p. xvi.

² *Ibid.* p. ii.

A NEGLECTED METHOD OF VOLUNTARY WINDING-UP.

If a sensible business man were asked the question, what in his opinion would be the best way of winding up the affairs of an insolvent company, he would probably make an answer of the following character:—Get an accountant or other suitable person appointed by the creditors, pay him a liberal fee, and give him a free hand. If he were asked why this course is seldom or never adopted, he would be puzzled, and would probably reply that he supposed it was not permitted by the Companies Acts. He would be surprised, and perhaps a fair number of legal practitioners would be surprised, to be told that the method was not only not prohibited, but was actually one of the methods prescribed by the Companies Acts.

Everyone knows the normal life-history of the insolvent company: the gradual sinking into debt, the clamours of creditors, the sudden awakening of the directors to the fact that the company can struggle on no longer, their half-stifled misgivings as to their conduct as directors, the hastily summoned meeting, the resolutions for voluntary winding-up and the appointment of a liquidator. Little wonder need be felt by students of human nature that the latter, on whom the whole burden of successful liquidation rests, is usually the secretary or a director or one of their personal friends. At the best he is an appointee, nominally of the shareholders, virtually of the directors; he is accountable to the company alone; and his very salary—payable though it is out of assets belonging to creditors—is often fixed by the shareholders.

Now consider for a moment the position of a creditor. Assuming the usual state of things, viz. that the company is wholly insolvent, the assets belong to the creditors and ought to be collected as cheaply and expeditiously as possible for their benefit. Yet creditors have no rights in a pure voluntary winding-up! The Companies Act, 1862 (except for clauses 135 and 136), appears to be framed on the supposition that the company which is being voluntarily wound up is solvent. The power to apply to the Court under sect. 138 is confined to liquidators and contributories. The meetings to be called by the liquidators are meetings of the company. The power to fill up a vacancy in the office of liquidator, or to apply to the Court to appoint a liquidator is not exerciseable by creditors. The final account of the liquidator is presented to the company. These are some of the minor disadvantages of

voluntary winding-up from the creditors' point of view. The vital objection is this, that the wrong man is the liquidator. What fraud there may have been in the formation of the company or in the conduct of its business, what dividends have been paid out of capital, what misfeasances have been committed by the directors—on all these points the creditors are usually ignorant: but they are rightly convinced that a nominee of the directors is not the proper person to investigate them. And such matters as the making of calls, settling the list of contributories, and the sale of the entire property of the company, ought certainly not to be left to the discretion of a person not directly answerable to the parties really concerned, aided it may be by the advice of gentlemen whose interests are by no means identical with those of the winding-up. It would indeed be difficult to find a reason why the liquidator should be appointed by the shareholders in the case of an insolvent company. *A's* property has in effect passed to *B*, yet *A* takes upon himself to appoint his own agent, *C*, to manage it.

The natural consequence of these considerations is an order for supervision or compulsory winding-up: the first of which usually leaves the main objection of the creditors—the liquidator—untouched, and the second of which entails the necessarily considerable cost of doing justice on directors *plus* the cost of official requirements and red tape. Is it matter for surprise that the current methods of winding-up are not satisfactory to the commercial community?

The remedy suggested is a liberal resort to sect. 135 of the Companies Act, 1862. That section provides as follows:

'A company about to be wound up voluntarily, or in the course of being wound up voluntarily, may, by an extraordinary resolution, delegate to its creditors, or to any committee of its creditors, the power of appointing liquidators or any of them, and supplying any vacancies in the appointment of liquidators, or may by a like resolution enter into any arrangement with respect to the powers to be exercised by the liquidators, and the manner in which they are to be exercised; and any act done by the creditors, in pursuance of such delegated power, shall have the same effect as if it had been done by the company.'

Sects. 136 and 137 provide further with respect to an arrangement under sect. 135:

'136. Any arrangement entered into between a company about to be wound up voluntarily, or in the course of being wound up voluntarily, and its creditors shall be binding on the company if sanctioned by an extraordinary resolution, and on the creditors if acceded to by three-fourths in number and value of the creditors, subject to such right of appeal as is hereinafter mentioned.

'137. Any creditor or contributory of a company that has in

manner aforesaid entered into any arrangement with its creditors may, within three weeks from the date of the completion of such arrangement, appeal to the Court against such arrangement, and the Court may thereupon, as it thinks just, amend, vary, or confirm the same.'

'The course suggested is now plain. As soon as the directors of a company are made aware that the company is insolvent, they should summon a meeting of shareholders and pass an extraordinary resolution delegating to the creditors or to a creditors' committee the power of appointing a liquidator or liquidators and of supplying any vacancy in that office. It would often be desirable to write previously to the more important creditors (the term, it may be observed, includes debenture-holders) informing them of the position of the company and stating the course the directors propose to take in the interests of the creditors. The creditors, it may be safely prophesied, would generally jump at the offer. The meeting of creditors would be promptly summoned by the directors or by a creditor, and those present would appoint a liquidator. It may be suggested parenthetically that they should vote him a lump-sum fee as well as a commission; for this tends to expedition in his proceedings. And it should be understood that he is to have a free hand and is not intended to make frequent applications to the Court to sanction his various steps. It might in some cases be useful to provide that in matters of doubt he was to be entitled to take and act upon the opinion of some named legal adviser. Provision might also be made for meetings of creditors. The details would depend on the circumstances of the case.'

In some instances an arrangement with respect to 'the powers to be exercised by the liquidators and the manner in which they are to be exercised' may be desirable: but it is easy to see certain practical difficulties here. The arrangement presupposes some sort of previous conference with the creditors: for it has to be acceded to by three-fourths in number and value of the creditors. And it is subject to an appeal which may also lead to difficulty. The delegation to the creditors of the right to appoint a liquidator is open to no such objection. All that is necessary is the extraordinary resolution of the shareholders, followed by the appointment by the creditors of a liquidator. No special majority of creditors is necessary, and there is no appeal. A dissatisfied creditor can, of course, apply for a supervision or a compulsory order: but, assuming the transaction to have been bona fide, his principal arguments for an order are gone. How can he make out that he will be prejudiced by the winding-up of the company under a competent nominee of the creditors?

One point remains for consideration. What have the directors or the company to gain by the course outlined above? What inducement can be offered to them to act in the way proposed? It may be conceded that if the fond dream of all directors, that is, liquidation by their own nominee, could be realized, they would have nothing to gain. But in nine cases out of ten, if the company is insolvent, an order has to be made sooner or later. Once this is acknowledged, it may be asserted with some confidence that the directors are keenly interested in securing a private winding-up. Even where they are perfect examples of the honest and upright man, privacy has its obvious advantages. No dirt can stick if none be thrown. Where peccadilloes, consisting mainly of negligence, may be laid at their door, the argument is still stronger. If a man has incurred some liability for breach of duty, it is far better for him to deal on commercial lines with a person who is interested in obtaining compensation for the injured rather than punishing the guilty. A director in this position could easily settle on a fair basis with a creditors' liquidator: and he would be spared the ordeal, often unjust in its operation, of a public examination and a misfeasance summons. The creditors, moreover, would not lose by such a settlement. It too often happens, in cases of compulsory winding-up, that directors are vainly harried at the expense of creditors, or that the spoils of a costly war consist at best of a tarnished character and an irrecoverable debt.

The unofficial members of an insolvent company, assuming their shares to be fully paid, have no practical interests in the winding-up of the company, and all that can be said to induce them to delegate the appointment of the liquidator to the creditors is that the act is simply fair and just, and that the creditors who have assisted the company to carry on its business have a moral right to expect it. But if calls have to be made the shareholders will be well advised in avoiding an order of the Court. Their only hope lies in cheapness: and to this extent their interests and those of the creditors are identical¹.

It is not contended that the mode of winding-up above insisted on is of universal application. But it is claimed that it is a mode capable of extensive use in insolvent companies and strangely neglected if regard is had to the very great advantages it offers to those immediately concerned.

F. H. MAUGHAM.

¹ The solicitor of the company would in some cases be interested in opposing a delegation to creditors as above suggested. The creditors' liquidator would perhaps be less likely than the liquidator of the shareholders to employ him in the winding-up. This objection must be faced.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

The Law of the Domestic Relations. Second Edition. By W. P. EVERSLY. London : Stevens & Haynes. 1896. 8vo. xv and 1011 pp. (38s.)

MR. EVERSLY's work on the Law of the Domestic Relations has long established its position as a standard work on the wide range of subjects within its scope.

The idea of grouping together the subjects of which it treats was no doubt derived from Lord Fraser's famous Scottish work, but the patient elaboration on the lines thereby suggested of the wide field of English law, which convenience, if not strict logic, ranges under its title, is entirely due to the credit of Mr. Eversley.

We congratulate the author on his wonderful diligence in examining and digesting such a vast mass of material, in setting it forth in a clear and attractive style, and in bringing it in the present edition so well up to date. Since the first edition appeared in 1885, the Legislature has been even more active than the Courts in dealing with the subjects comprised in this work. The Married Women's Property Act, 1893, has swept away the subtleties which arose from the necessity of proving the existence of free separate estate at the date of a married woman's contract under the Act of 1882 : while among the many statutes amending the law in the spheres of guardian and ward and of parent and child are The Guardianship of Infants Act, 1886, The Custody of Children Act, 1891, and The Prevention of Cruelty to Children Act, 1894. These statutes and many others have been carefully assimilated in the present edition.

Our author's pet subject is no doubt the married woman, well described as 'a spoilt child of the Legislature,' which obviously in these days does not share the *Spectator's* view, that 'separate purses between man and wife are as unnatural as separate beds.' No part of the work deserves more unqualified praise than the chapters on the effects of coverture and on the contracts by married women.

Few recent decisions which have any bearing on his subject have escaped our author's notice, but sometimes *dormitat Homerus*. 'The strongest case to be found in the books' of the avoidance of a marriage on the ground of the lady not having been a 'free agent,' is not the *Sebright* case referred to on p. 72, where the lady went through the ceremony under a threat of being shot, but the recent case of *Ford v. Stier*, '96, P. 1, where the lady was induced by a strong-minded mother to believe the ceremony of a marriage in church to be only a betrothal. The doctrine of *Loftus v. Heriot*, as given on p. 432, that a restraint on anticipation applies to arrears of a married woman's income accrued due before the date of a judgment against her,

was overruled by the House of Lords, but only a few months before the publication of the present work, see '96, A. C. 174. The recent case of the *Imperial Loan Co. v. Stone*, '92, 1 Q. B. 559, would justify a somewhat stronger statement in favour of upholding contracts, whether executory or executed, with lunatics than the statement on p. 830, which is correct enough so far as it goes.

But these somewhat minute criticisms are not intended to detract from the admitted excellence of this valuable work. Each branch of the subject is treated with the detail and exactness of a treatise adequate on that special branch for professional use. The full and complete index and tables of cases and statutes leave nothing to be desired. Instead of elaborating some mere phase of a subject into a treatise, as is the case with so much contemporary book-making, the author has condensed what might well form the materials for four distinct treatises into one compendious and handy volume, which is as pleasant to read as it is safe to follow.

S. H. L.

The Law of Torts. By J. F. CLERK and W. H. E. LINDSELL. Second Edition, by the Authors, assisted by T. HOLLIS WALKER. London: Sweet & Maxwell, Lim. Calcutta: Thacker, Spink & Co. Melbourne and Sydney: C. F. Maxwell. 1896. La. 8vo. lxix and 733 pp.

A sad interest attaches to the appearance of the second edition of this valuable work from the almost contemporaneous death, after a long and distressing illness, of one of its authors. Mr. Lindsell was a man who will long be remembered both on his circuit and in the Temple. His burly exterior and somewhat brusque address, the vigorous manliness of all he did and said, the warm and generous heart incapable of anything small or mean which lay beneath, his wide and accurate knowledge of English law and hardly less extensive acquaintance with English letters, combined to make a striking character and personality which never failed to impress those who knew him, and will always be dear in the memory of his friends.

Owing to the changes which in the course of the last seven years have been made in the various branches of the law with which this work is concerned, the authors have thought it necessary in this second edition to rewrite considerable portions of it, without however altering the main divisions and arrangement of the book.

In the introductory chapter are discussed the various meanings to be assigned to the equivocal term Malice, particularly in connexion with the important group of cases arising out of trade competition and labour disputes. The authors show how this term is employed to denote sometimes improper motives prompting an act, and sometimes improper methods used in accomplishing an otherwise lawful purpose. Their careful and instructive discussion of this head of their subject serves to show how difficult it is to arrange these cases under any clear and certain principles, and how largely they are influenced by those vague and shifting considerations which are known under the general name of public policy.

The subject of joint torts is well treated. The authors submit, although there is no authority which directly warrants this proposition, that where the tortious acts of several persons contribute to produce but one joint damage, such persons are joint tort-feasors. But they admit that they must here distinguish between cases where the union of the acts of the several tort-feasors is essential to produce any damage (as where one person

tortiously allows gas to escape, and another tortiously explodes it), and cases where the total damage is but the cumulation of similar items of damage produced by several torts similar in character. The illustrations given of the latter class of cases suggest the question whether it would not be desirable to give the Court larger powers of allowing the joinder of defendants. The new Rule 1 of Order XVI makes provision for the joinder of several plaintiffs having several rights of action arising out of the same transaction or series of transactions and involving some common question of law or fact. Surely it would be well if some corresponding provisions were enacted for the joinder of defendants which might embrace, for example, such cases as *Sadler v. Great Western Railway Co.* '95, 2 Q. B. 688.

The doubt expressed by the authors as to the soundness of the Divisional Court's decision in *Guildham v. Twist* ('95, 1 Q. B. 557) is virtually confirmed by the Court of Appeal ('95, 2 Q. B. 84). To hold that a servant has authority in case of sudden emergency to appoint another person to act *as a servant* on his master's behalf would be a dangerous extension of the doctrine of the implied authority of servants.

The recent decision of *Hardaker v. Idle District Council* ('96, 1 Q. B. 335) is duly placed among the cases relating to the extent of an employer's liability for the tortious acts of a contractor. It might, however, have been worth while to call special attention to the broad principles so ably laid down and illustrated in the judgment of Lindley L.J. The main question in cases of this description is: Was it the defendant's own duty to prevent the act complained of? If so, that duty could not be delegated. The perilousness or unlawfulness of the undertaking may be regarded as constituting some of the tests for deciding that question. It is difficult to state this general principle in a concise form, but it is perhaps best expressed in the words of Lord Blackburn in *Dalton v. Angus* (6 App. Cas. 740, 829): 'Ever since *Quarmann v. Burnett* (6 M. & W. 499) it has been considered settled law that one employing another is not liable for his collateral negligence, unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts upon him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty, and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it.'

At the date of the decision in the *South Staffordshire Waterworks Co. v. Sharman* ('96, 2 Q. B. 44), the portion of this work affected by it was too far advanced to admit of more than the mere mention of the case, but an appendix devoted to the discussion of the decision has since been inserted. In this the authors submit, for reasons which they set forth at length, that at all events so far as the *ratio decidendi* is concerned the case cannot be supported. It is true that the words of the judgment 'being dropped in the public part of the shop' do seem from their context to imply that this fact was expressly relied on in the judgment of Patterson J., whereas as a matter of fact the distinction between the public and non-public part of the shop was not referred to by the judges of the Court of Queen's Bench. It is for all that not unreasonable to suppose that it may have been recognized by them in the course of the discussion, for the distinction in itself has much to commend it. Moreover, the recent case did not decide that the presumption of the landowner's possession is irrebuttable, nor even, in express terms,

that it was a presumption of *law* at all. Circumstances alter cases, and it would be quite consistent, as it seems to us, for the same tribunal to decide the ring case, and also the case (which our authors cite) of *Reg. v. Moore* (Leigh and Cave, C. C. 1), in the way in which they were decided respectively. In *Merry v. Green* (7 M. & W. 623) the question was what passed by the delivery of the bureau.

It would require a long article to discuss adequately even the principal additions and alterations made to this work since it was first published. Suffice it to say that after a careful examination of a large number of them it seems to us that the new edition has been very ably prepared and has added greatly to the value of an excellent treatise.

The Law and Practice of Building and Land Societies, including the Law of Co-operative Building Societies. By the late H. F. A. DAVIS. Fourth Edition. By J. E. WALKER. London: Sweet & Maxwell, Lim. 1896. 8vo. xx and 664 pp. (21s.)

To those who have to wade through and attempt to understand the clumsy and ungrammatical jumbles which building society rules often are, this book will be very welcome. It may be presumed that many people understand something about the objects and working of building societies, but amongst the multitude probably there are comparatively few lawyers. We do not blame them. The older books on the subject, and the rules governing or supposed to govern these bodies, were for the most part written, apparently, with one main object—to impart as little knowledge as possible, and to keep building society law a mystery, the secrets of which were only to be shared in by a select few. Notwithstanding their almost fraudulent efforts at concealment, the veil has at length been torn down, and those who are responsible for the work now under review, and perhaps one other authority on the same subject, have placed before the profession clear statements of what a building society is, how it can be formed, and on what lines it ought to be governed and managed. This fourth edition deserves to be a success, for while it will teach to an expert in building society law all that he still has to learn, it is so simply and clearly written as to be readily understood by those who are altogether ignorant of the subject. The book is well arranged, and written in an attractive style. All the recent changes effected by statute or by case law are noticed in the proper places; the appendices contain the statutes and some very useful forms; and the book will be found to be essential not only to lawyers and secretaries, but to students. Those who have written it have honestly attempted to give their readers all their knowledge, instead of stopping short at every difficulty with a broadish hint that if further information is required it will be advisable to come to the gentleman whose name is on the title page, and whose professional address may be found at no great distance from it, with a case for opinion marked with a fancy figure.

An Elementary Treatise on Magisterial Law and on the practice of Magistrates' Courts. By W. SHIRLEY SHIRLEY. Second Edition. By LEONARD H. WEST. London: Stevens & Sons, Lim. 1896. 8vo. 208 pp. (7s. 6d.)

AT page 68 Mr. Shirley says: 'This does not profess to be an exhaustive treatise on the practice of Magistrates' Courts, but only an introductory work.' And thus he justly describes his book, which in the second edition contains 208 pages in all, inclusive of a good Index. In his Preface he

acknowledges his general indebtedness to Mr. C. M. Atkinson's Magistrates' Annual Practice and to Stone's Justices' Manual, which useful works can be by no means superseded by this small book. It is a very good book as an introduction; and in a short space, well arranged in two parts, it tells a magistrate nearly all he ought to know by way of beginning. Mr. Shirley calls the cases disposed of at Petty Sessional Courts by way of shortness 'Summary Offences' and 'Matters of Complaint,' and he also describes the preliminary proceedings in those courts in the case of Indictable Offences.

At page 129 the trout-fishing public will be astonished to find that 'Fishing for, or buying, selling, exposing, or having in possession for sale any fresh-water fish between March 15 and June 15 is punishable with fine of not exceeding £2 and forfeiture of the fish and tackle' (41 & 42 Vict. c. 39). This passage, without the exceptions in the Act, is delusive and surprising. At page 146 will be found a paragraph on 'Permitting Drunkenness or violent conduct.' The word 'permitting,' not applicable to this paragraph, should be transferred to the next—'Selling to Drunken Persons.' The book would be more useful if it contained more particulars as to indictable offences, and the powers of Magistrates with regard to them. These cases are perhaps the most troublesome in practice to justices not learned in the law.

Oliphant's Law of Horses. By C. E. LLOYD. Fifth Edition. London : Sweet & Maxwell, Lim. 1896. 8vo. xlix and 525 pp. (21s.)

THE horse in spite of bicycles and motor-cars still remains, and is likely to remain, an important factor in our civilization, as this handsome and excellent edition of the well-known Oliphant testifies. The horse—his keep, his shoeing, his hiring, his carrying, his hunting, his trespassing, his unsoundness, his vice, his racing, his driving, have gathered round him a very considerable body of law, and raised many a nice problem which will be found here luminously treated. The dog as a topic of law is indeed nowhere as compared with the horse. Strange that this noble creature—the horse—should be the centre of so much rascality. Already in time of Cicero the British horse-dealer had got a reputation for swindling which he has since fully maintained. Indeed, the law pays no attention whatever to 'dealers' talk' about fine action or clever little horses. Apropos of dealers it is a curious anomaly—though lawyers can explain it—that ordinary people can strike a valid bargain about a horse on Sunday but horse-dealers cannot (see *Bloxsome v. Williams*, 3 B. & C. 232, 27 R. R. 337). As to warranties—that much-vexed topic—Mr. Lloyd sums up with an excellent piece of advice, 'Never give a warranty if you can help it.' Let us add another piece of advice—Lord Westbury's. That learned lord was once driving, or rather being driven, when the horses bolted. His servant, pale with fright, turned to him and said, 'I can't hold them, sir; what shall I do?' Lord Westbury, cool as a cucumber and with the lawyer's presence of mind, promptly replied, 'Drive into something cheap.'

The Preservation of Open Spaces and of Footpaths and other rights of way: a practical treatise on the law of the subject. By Sir ROBERT HUNTER. London: Eyre & Spottiswoode. 1896. 8vo. xxii and 424 pp.

THE object of this book is to furnish those who are interested in preserving the open lands of the country, and the footpaths and other

means by which rural England may be enjoyed, with a sketch of the law by which such enjoyment is secured and regulated.' We must congratulate the author on the skill, clearness, and accuracy with which he has carried out his task. The book is divided into two parts; the first part contains a description of the law as to commons and other open spaces, such as village greens, wastes of a forest, bush, allotments, and recreation grounds; the second part discusses footpaths and other rights of way, such as rights over roadside wastes, foreshores, cliffs, rivers, and lakes; there are also some valuable appendices. While the book is intended primarily for the use of laymen, the author has collected a vast mass of information, not perhaps to be found elsewhere in a collected form, which will be useful to the practising lawyer. The author writes in a very lucid style, and we venture to think that any person of ordinary ability, who reads the book with attention, will readily acquire a greater knowledge of the law described in it than is possessed by most practitioners: a knowledge which is of the utmost importance to those who take an active part in the management of public affairs of rural England.

We have also received:—

Studies in the Civil Law, and its relations to the law of England and America. By WILLIAM WIRT HOWE. Boston, Mass.: Little, Brown & Co. 1896. 8vo. xv and 340 pp.—Judge Howe's studies are pleasantly and elegantly written, and will be acceptable to American students, especially in the author's own State of Louisiana. The fact that the German literature of Roman law is accessible to him only through the very incomplete samples of it which are offered by English and French translations prevents the book from having any claim to be a serious contribution to the subject. On such matters e.g. as the Twelve Tables it is many years out of date. With regard to the historical connexion between Roman law and the Common law, there is a distinction which Judge Howe has not, in our opinion, sufficiently brought out. It has been the fashion, as we hold notwithstanding Mr. Crackanhorpe's paper in the last number of this REVIEW, to overrule the direct influence of Roman law in this country. Judge Howe, like several of his predecessors, sees imitation where we can see only the similar development of ideas which either are common to all systems at corresponding stages of archaism, or were naturally produced both at Rome and at Westminster by the necessity of dealing with similar practical questions. A dachshund's forefoot is very like a mole's, not because one is in any way derived from the other, but because in both cases a common type of forefoot is modified for the same purpose of digging. On the other hand modern research tends to show that the indirect influence of Roman ideas and methods has, if anything, been underrated. Our author is quite right in adducing trial by jury as a striking example of this kind. Again the contents of the Anglo-Saxon secular laws are as far from Roman as can be, but it was '*iuxta exemplum Romanorum*', as we are expressly told, that they came to be preserved in writing. This, however, is not the place for pursuing so large a topic. There is an interesting biographical chapter at the end of the book on Judge Martin, who had a chief share in bringing order out of the chaos of old Spanish and French law in the early days of the Supreme Court of New Orleans.

The Elements of Jurisprudence. By THOMAS ERSKINE HOLLAND, D.C.L. Eighth Edition. Oxford: at the Clarendon Press. London: Henry VOL. XIII.

Frowde, and Stevens & Sons, Lim. 1896. 8vo. xxi and 404 pp.—The principal new feature in this edition is the frequent citation of the German Civil Code, for which students of comparative law will be thankful. We find one little bit of criticism to offer: trial by battle was hardly 'a late survival in England of regulated self-help' (p. 316) as it was imported full-grown from Normandy.

A Calendar of the Inner Temple Records. Edited by F. A. INDERWICK, Q.C. Vol. I. 21 Hen. VII (1505) to 45 Eliz. (1603). London: Henry Sotheran & Co., Stevens & Haynes, and Stevens & Sons, Lim. 1896. 4to. xviii and 536 pp.—On this magnificently produced volume both time and space forbid us, at present, to note more than *loquendum*. We could wish that the publishers had more respect for their own work than to cause the words 'Review Copy' to be written right across the top of the title-page in a particularly disfiguring manner.

The Lawyer's Companion and Diary for 1897. Edited by E. LAYMAN. London: Stevens & Sons, Lim. 1897. 8vo. 195 and 650 pp.

Sweet and Maxwell's Diary for Lawyers for 1897. Edited by F. A. STRINGER and J. JOHNSTON. London: Sweet & Maxwell, Lim. 416 pp.—It would be difficult to say which of these two books is the better. They are both posted up to date and contain all information likely to be of service or interest to lawyers. The *Lawyer's Companion* is both a Diary and a Law List.

Ruling Cases. Edited by R. CAMPBELL. With American Notes by IRVING BROWNE. Vol. IX. Defamation—Dramatic and Musical Copyright. London: Stevens & Sons, Lim. Boston, Mass.: The Boston Book Co. 1896. La. 8vo. xxxi and 907 pp. (25s.)

The Revised Reports. Edited by Sir F. POLLOCK, assisted by R. CAMPBELL and O. A. SAUNDERS. Vol. XXVI. 1823–1826 (2 Russell; 2 B. & C.; 3 Dowl. & Ry.; 12 Price; 2, 3 L. J. (O. S.)). London: Sweet & Maxwell, Lim. Boston, Mass.: Little, Brown & Co. 1896. La. 8vo. xv and 735 pp. (25s.)

An Index of all Reported Cases decided in the English Courts during the period covered by the Revised Reports, Vols. I–XXV, showing the cases retained and omitted therefrom and distinguishing overruled cases. 1785–1826. London: Sweet & Maxwell, Lim. Boston, Mass.: Little, Brown & Co. 1896. La. 8vo. xvi and 517 pp. (10s.)

Principles of the Law of Real Property. By the late JOSHUA WILLIAMS. Eighteenth Edition. By T. CYPRIAN WILLIAMS. London: Sweet & Maxwell, Lim. 1896. 8vo. lxii and 711 pp. (21s.)

The Inland Revenue Regulation Acts. With notes, &c., by NATHANIEL J. HIGHMORE. London: Stevens & Sons, Lim. 1896. 8vo. xviii and 231 pp. (7s. 6d.)

The Student's Guide to Constitutional Law and Legal History. By JOHN INDERMAUR and C. THWAITES. Second Edition. London: G. Barber. 1896. 8vo. 148 pp. (7s. 6d.)

Several book reviews are unavoidably held over for want of space.
